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, LLC
APPELLEES/DEFENDANTS

ON APPEAL FROM

THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS & ST. JOHN

ST-2020-CV-0298

APPELLEE SUMMER'S END GROUP, LLC'S BRIEF

Boyd L. Sprehn, Esq.
Law Office of John H. Benham, P.C.
P.O. Box 11720
St. Thomas, VI 00801
9800 Buccaneer Mall, Bldg. 2, Suite 9
St. Thomas, U.S. Virgin Islands 00802
sprehn@benhamlawvi.com
O: 340-774-0673
C: 340-643-2660
Fax: 800-948-1947

August 26, 2021

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES .... ii-iii

STATEMENT OF JURISDICTION 4

STATEMENT OF THE ISSUES 4

1. Whether The Superior Court's Finding That The Legislature's RatificationOf The Governor's Modification Of The Permit Under 12 V.I.C. § 911(e) And (g) Rendered The Underlying Case Moot And Non-Justiciable Was Erroneous 4

2. Whether The Governor Properly Exercised His Authority To Modify The Permit Under 12 V.I.C. § 911(g). 4

STATEMENT OF RELATED CASES OR PROCEEDINGS 4

STATEMENT OF THE CASE 6

STANDARD OF REVIEW 10

SUMMARY OF THE ARGUMENT 10

ARGUMENT 11

POINT I 11

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 MootAnd Non-Justiciable; Therefore, The Court's Grant Of Defendants' Motion To Dismiss Was Proper 11

POINT II 18

The Superior Court Properly Found That The Governor's Modification Of The Consolidated Permit Was Lawful 18

CONCLUSION 25

CERTIFICATE OF BAR MEMBERSHIP 26

CERTIFICATE OF FILING 26

CERTIFICATE OF WORD COUNT 26

TABLE OF AUTHORITIES

CASES

Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)……………….26
Bryan v. Fawkes, 61 V.I. 201 (V.I. 2014)……………………………………..16, 22
Goodwin v. US Federal Election Comm'n., *2012 WL 4009903*………………….22
Helvering v. ***Stockholms Enskilda Bank***, 293 U.S. 84 (1934)………………………19
Hodge v. McGovan, 50 V.I. 296 (V.I. 2008)……………………………………………...4
Hoffer v. Microsoft Corp., 405 F.3d 1326 (Fed. Cir. 2005)……………………….10
In re Infant Sherman, 49 V.I. 452 (2008)……………………………………...19
In re Joseph, 65 V.I. 217 (V.I. 2016)……………………………………………..17
Kendall v. Russell, 572 F.3d 126 (3d Cir. 2009)………………………………...16
Matteo v. Superintendent, SCI Albion, 171 F.3d 877 (3d Cir. 1999)…………….10
People of the VI v. Baxter, 49 V.I. 38, 393…………………..………………19
Smith v. Magras, 124 F.3d 457 (3d Cir. 1997)……………………………………16
Sorenson v. Sec'y of Treasury, 475 U.S. 851 (1986)……………………………19
Springer v. Gov't of the Philippine Islands, 277 U.S. 189, 48 S.Ct. 480, 72 L.Ed 845 (1928) ……………………………………………………………………….22-23
S***t. Thomas-St. John Bd. Of Elections v. Daniel***, 49 V.I. 322 (2007)…………….10
Toussaint v. Stewart, 67 V.I. 931 (2017)…………………………………………….10

LAWS

V.I.C. Rev. Org. Act of 1954……………………………………………………...9
Act No. 8407………………………………………………………………………..9

STATUTES

4 V.I.C. § 32(a)………………………………………………………….……….4
5 V.I.C §1421………………………………………………………………………..5
12 V.I.C. § 903(1)-(5),(7)-(10)…………………………………………………13, 22
12 V.I.C. § 911…………………………..…7,8, 10, 11, 12, 13, 15, 16, 18, 19, 20, 24
12 V.I.C. § 913…………………………………...…………………………..7
12 V.I.C. § 914……………………………………………………………………..14

TREATISES

Sutherland on Statutes and Statutory Construction § 69:4 (rev. 6th ed. 2003 and 2007 update)………………………………………………………19

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) and (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

Related proceedings include three appeals to the Board of Land Use Appeals in 2014 (by the Virgin Islands Conservation Society and the Moravian Church Conference) and 2016 (by the Virgin Islands Conservation Society, in which the president and founder of Save Coral Bay, Inc., David Silverman was a supporting affiant and at that time a member of the St. John Committee of the Coastal Zone Management Committee). In the first appeal the Board of Land Use Appeals upheld the issuance of the permits, and at the urging of appellants consolidated the

two permits. In the second appeal the Board of Land Use Appeals again upheld the issuance of the permits and clearly stated that the consolidation of the permits was effective on its order, despite the assertions made by petitioner herein.

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 moots the long-delayed writ proceeding.[1] The petitioners in those cases have opposed the motion based upon the same arguments made by Appellant in the present case. Thus, the Court's holdingin the instant case should resolve the long overdue writs of review.[2]

[1] The writ proceedings have been pending since October 2016, following a 17-month long BLUA process. Briefing in these proceedings was completed in January 2017. Despite four different attempts by SEG to obtain a hearing or action on these writs, prior to the currently pending and fully briefed Motions To Dismiss, the matters remain pending and unaddressed. Petitioners have not joined in any effort to seek resolution, preferring to maintain the cloud of pending litigation.

[2] In the writ proceedings Petitioner VICS now appears to seek relief against the Governor and the Legislature, but Petitioner has not named or served either. Nor could it – a writ of review is simply not available to review the actions of the Legislature. Title Five of the Virgin Islands Code provides:

> **1421. Proceedings and orders reviewable**
>
> Any party to any proceeding before or by any *officer, board, commission, authority, or tribunal* may have the decision or determination thereof reviewed for

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 and in compliance with the directives of the Department of Public Works, 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 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.*)

> errors therein as prescribed in this chapter and rules of court. Upon the review, the court may review any intermediate order involving the merits necessarily affecting the decision or determination sought to be reviewed.

A Writ of Review simply does not and cannot extend to a review and reversal of the Governor's action that has been ratified by the Legislature.

As stated in SEG's Motion to Dismiss, Superior Court Transmittal Docket No. 22, SEG provided the following statement:

> 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.

[See also JA40-44 (Board of Land Use Appeals Decision, January 4, 2021.]

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 [now Act No. 8407] 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. Chaliese 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.

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 that lasted about seven hours (Id.). On December 21, 2020, the Legislature passed Act No. 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*.) Following the hearing, another round of briefing occurred (Superior Court Docket Nos. 32-34).

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 demonstrated that it, not the Superior Court, fails to understand 12 V.I.C. § 911,[3] the concept of legislative ratification, and the separation of powers doctrine. The Governor properly modified the Consolidated Permit pursuant to 12 V.I.C. § 911(g), and the Legislature's ratification of the Consolidated Permit rendered Appellant's claims moot under the separation of powers doctrine. Section 911 of the Coastal Zone Management Act is unambiguous. Appellant's interpretation of Section 911, and refusal acknowledge the process of permit issuance, affirmation, approval and ratification would lead to an absurd result which would actually frustrate the application of the Act.

[3] All Code references are to Title 12, unless otherwise noted.

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)'s 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.*) 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. 12 V.I.C. § 911(g). (JA9). The Governor's modification of the consolidated permit satisfiedevery requirement of Section 911(g).

Appellant has engaged in sophistry and attempted to assert that the Governor

cannot modified the Consolidated Permit because it is not issued until the Legislature ratifies the permit. But that is not the language of the Coastal Zone Management Act or the decisions in this matter.

On June 6, 2016, the Board of Land Use Appeals ordered the two permits "consolidated" as one single permit. In its Decision and Order of June 6, 2016, BLUA found and ordered:

> **DECISION AND ORDER**
>
> …For the following reasons, the BLUA finds that the land and water permits are to be consolidated as one permit, and affirms the decision of the St. John Committee of the Virgins Islands Coastal Zone Management Commission ("CZM")
>
> …
>
> 13) In affirming CZM's decision to issue the permits to SEG, the BLUA also concurs with the Moravian Church Conference's argument that the Permits should be consolidated as one (1) permit application.
>
> 14) As Moravian Church correctly identified, the Environmental Assessment Reports for each application repeatedly state that each Permit is dependent on the other. Because the Land and the Water permit applications are mutually dependent developments, they must be treated as one permit application.
>
> …
>
> **ORDERED** that the Permits at issue here, CZJ-4-14(L) and CZJ-4-14(W), be consolidated.

The Board of Land Use Appeals had full power to impose this condition. Section 914(d) provides, in relevant part:

> ...If the Board grants an application for a coastal zone permit, ***the Board shall impose such reasonable terms and conditions on such permit as it deems necessary to achieve the objectives and purposes of this chapter***.

The permit was *issued* by the St. John Committee of the Coastal Zone Management Commission, and *affirmed* by Board of Land Use Appeals (twice now). It was then *approved* by the Governor,[4] and has now been *ratified* by the Legislature.

In addition, we simply note that the Legislature has always had the power to review permits and submerged lands leases that the Legislature is the trustee of those public lands and waters, and that even if this Act conflicted with the CZM Act (and we most assuredly do not think that it does), the Legislature is not bound by preceding Legislatures. Instead, VICS asks this Court to substitute its judgment for that of the CZM staff, the St. John Committee of the Coastal Zone Commission, the Board of Land Use Appeals (now twice), and Governors De Jongh and Bryan (who both approved the permit) and the Legislature.

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

[4] It has actually been approved twice by the Governors, originally by Governor DeJongh in 2014, and again by Governor Albert Bryan, Jr. in 2019.

> 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).

Again, as a courtesy, we will not repeat Appellee Governor Bryan's argument regarding mootness, but fully join and concur with that argument.

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.

Appellant presents no authority that would permit the Superior Court or this Court to override the ratification of the Consolidated Permit by the Legislature and substitute Appellant's opinion for the considered decisions of the Governor and the Legislature.

This Court must reject Appellant's contrived reading of Section 911(g) because it violates the basic precepts of statutory construction. The Superior Court's Order should be affirmed in full.

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)

The purpose of legislative ratification of executive action is to check executive power or confirm the chief executive's power.

Appellant admits that Governor Bryan complied with Section 911(g) by stating that the modification is necessary because the permit would cause significant environmental damage. (Appellant Brief, p. 23). Nevertheless, Appellant seeks to have the Superior Court and this Court hurdle the Separation of Powers doctrine and overrule the Governor's action, which, on its face complies with the law and which the Legislature has ratified. In short, Appellant wants this Court to overturn the Superior Court's Order and overrule the Legislature to "unratify" the Consolidated permit.

Summer's End Group joins Appellee Governor Bryan's brief in its

discussion of the allegation that the Governor's action was *ultra vires*, and will spare the Court its recitation here (See Appellee's Brief at 18-22).

Appellant's argument ignores the record before the 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.[5] The Legislature devoted two full days to public hearings on this matter – a tremendous commitment of the Legislature's limited time and resources. Now Appellant wants the Superior Court and this Court to review that legislative process and determine if the Legislature was sufficiently diligent to have the Courts respect the Legislature's action, and, in Appellant's view, instead substitute the Court's judgment for that of the Legislature.

> What [Appellant] 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

[5] We must note that the Appellant's continual referral to and inclusion of the Letter of Senator Francis, dated December 10, 2019 (JA7), is mystifying. Following the Senate hearing in October 2019 the Senate heard no motions, considered no bills, and took no votes on the Summer's End Permits. Formal legislative rejection of the permits cannot have happened by the letter of any single senator.
And if such a letter could have constituted a rejection, the passage of Act No. 8407 overruled any such objection.

> judicial power; the executive cannot exercise either 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).

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.[6] Appellant 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 may disagree about the about balancing; it does not mean

[6] 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 …"]

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 or any Court.

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.

The Superior Court understood 12 V.I.C. § 911 and correctly applied the law to the facts of this case. The core facts are simple: (i) the Governor's modification of the Consolidated Permit followed the plain and unambiguous language of 12 V.I.C. § 911(g); (ii) both the issuance and approval of the permits and the Governor's modification of the same were ratified by the Legislature; (iii) Appellant has effectively admitted that the legislative ratification of the Governor's action renders the challenged action moot and non-justiciable. Consequently, this Court must affirmthe 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.

Respectfully Submitted,

Dated: August 26, 2021 By: */s/ Boyd L. Sprehn*

Boyd L. Sprehn, Esq.
Law Office of John H. Benham, P.C.
P.O. Box 11720
St. Thomas, VI 00801
9800 Buccaneer Mall, Bldg. 2, Suite 9
St. Thomas, U.S. Virgin Islands 00802
sprehn@benhamlawvi.com
O: 340-774-0673
C: 340-643-2660
Fax: 800-948-1947

CERTIFICATE OF BAR MEMBERSHIP

Boyd L. Sprehn, 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/ Boyd L. Sprehn

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

I certify that on August 26, 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. and Ian S.A. Clement

/s/ Boyd L. Sprehn

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 ofthe foregoing brief is 5,852 words.

/s/ Boyd L. Sprehn