In the Supreme Court of the Virgin Islan

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,

Appellees/Defendants

On Appeal from the Superior Court of the Virgin Islands, Division of St. Thomas & St. John, Case No. ST-2020-CV-00298

Principal Brief of Save Coral Bay, Inc.

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STATEMENT OF SUBJECT MATTER AND JURISDICTION

In the proceeding below, Save Coral Bay, Inc. challenged Governor Albert Bryan Jr.'s putative modification of a Coastal Zone Management permit issued to Summer's End Group and the Legislature's subsequent ratification of both the permit and the modification. Save Coral Bay brought the action under 12 V.I.C. § 913(b)(1) which allows "any person" to "maintain an action for declaratory and equitable relief to restrain any violation" of the Virgin Islands Coastal Zone Management Act, 12 V.I.C. §§ 901 *et seq*. The Superior Court had subject matter jurisdiction pursuant to 4 V.I.C. § 76(a).

On May 14, 2021, the Superior Court granted the motion and dismissed Save Coral Bay's complaint. Save Coral Bay filed a timely Notice of Appeal on May 25, 2021. Therefore, this Court has jurisdiction pursuant to 4 V.I.C. § 32(a).

INTRODUCTION

The Virgin Islands Coastal Zone Management Act ("VICZMA") offers a well-defined process for developing property near the coast of the U.S. Virgin Islands. A developer who follows the VICZMA enjoys certainty and a relatively smooth path to obtaining a CZM permit. However, a developer who steps off of the path and attempts to evade the VICZMA will encounter self-inflicted obstacles to its plans.

Summer's End Group ("SEG") seeks to build a marina bigger than the Yacht Haven Grande Marina in St. John's tiny Coral Bay; but SEG decided to step off the path provided by the VICZMA. One—of a myriad—of the problems with SEG's CZM permit application was its failure to possess the irrevocable legal right to develop the parcels it sought to develop. As a result, SEG encountered legal challenges that continue to this day in separate, but related, writ of review proceedings pending in the Superior Court and, ultimately, in this lawsuit and appeal.

During the pendency of the writ of review litigation, SEG's lack of legal control over the parcels was dramatically proven: Two of the parcels that SEG had failed to lock down under its control were sold and whatever control SEG ever had over those parcels was lost forever. The loss of

control over those parcels—which were in the middle of SEG's proposed development—meant that regardless of the results in the writ of review litigation, SEG would need to apply for a new CZM permit.

SEG did not want to follow the law and seek a new permit. Instead, it doubled-down on evading the law. SEG asked the Governor of the Virgin Islands to use an emergency power designed solely for the purposes of stopping an imminent threat to the environment as a vehicle for modifying the CZM permit to eliminate the two parcels of land from the permit. After the Governor acquiesced in SEG's scheme and modified the permit, Save Coral Bay, Inc. filed the underlying suit to challenge the Governor's action as contrary to his emergency powers under the VICZMA and therefore *void ab initio*. While Save Coral Bay's action was pending, the Virgin Islands Legislature "ratified" the Governor's action.

The Superior Court erroneously believed that the Governor could modify a permit for *any* reason prior to the permit's ratification and therefore did not consider Save Coral Bay's challenge to the modification; the court then concluded that Legislative ratification acted as "original authority" such that the Government's ultra virus modification was effectively cleansed. This appeal followed.

STATEMENT OF ISSUES PRESENTED AND STANDARDS OF REVIEW

ISSUE 1:

The Governor is authorized under 12 V.I.C. § 911(g) to modify a CZM permit if "it is necessary to prevent significant environmental damage to coastal zone resources." Here, the Governor modified SEG's permit as a convenience to (and at the request of) SEG and not for the purpose of preventing significant environmental damage. Because the Governor's action did not meet the criteria of the statute, his action was *ultra vires* and the modification was *void ab initio*. The Superior Court erred when it held that there were no limitations upon the Governor's power to modify a permit.

This Court's review the of Superior Court's construction of a statute or the Superior Court's application of law is plenary. *Toussaint v. Stewart*, 67 V.I. 931, 940 (2017).

ISSUE 2:

An *ultra vires* act (an act beyond the power)—unlike a defective *intra vires* act (an act within the power but procedurally defective)—cannot be ratified. Because the Governor's act was *ultra vires* (and thus void *ab initio*), the Legislature could not ratify it. The Superior Court erred when it held that the Legislature's ratification was "original authority" that essentially cured the Governor's *ultra vires* modification.

This Court's review the of Superior Court's construction of a statute or the Superior Court's application of law is plenary. *Toussaint v. Stewart*, 67 V.I. 931, 940 (2017).

STATEMENT OF RELATED CASES

The underlying CZM permit that is the subject of this appeal is also challenged in two writ of review proceedings that are consolidated and pending in the Superior Court of the Virgin Islands.[1] In those proceedings, the petitioners challenge the issuance of the CZM permit to SEG. Save Coral Bay is neither a party nor related to a party in either case.[2]

In those consolidated cases, SEG has filed a motion to dismiss, arguing that the Governor's modification of the permit and the Legislature's subsequent ratification of that modification and the permit denies the petitioners the statutory right of appeal that they have pursued since 2016. SEG supplemented its motion to cite the Superior Court's decision in this case as authority favoring dismissal. The petitioners in those cases have opposed the motion based upon many of the same arguments made by Save Coral Bay in this appeal. That motion remains pending. [3]

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[1] *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*, Case No. ST-2016-CV-00428.

[2] Undersigned counsel represents the Virgin Islands Conservation Society in its writ of review proceeding.

[3] The Court may wish to stay this appeal pending a decision by the Superior Court and likely appeal in the writ of review cases.

STATEMENT OF THE CASE

A. FACTS

This case is before the Court on appeal from the grant of a motion to dismiss. Consequently, there is a limited factual record; but, the Superior Court was required to accept the factual allegations of the complaint as true and therefore this statement of facts is based upon the allegations of the First Amended Complaint ("FAC") (APPX–28).[4]

On October 24, 2014, the St. John Committee of the Coastal Zoning Management Commission ("CZM Committee") issued separate CZM Permits (Nos. CZJ-03-14(L) and CZJ-03-014(W)) authorizing Summer's End Group ("SEG"), to develop a marina on Coral Bay, St. John along with associated offices, retail facilities and support structures on parcels adjoining Coral Bay. APPX–42, ¶10 (VIBLUA decision). The Virgin Islands Conservation Society ("VICS") and the Moravian Church Conference of the Virgin Islands ("the Church") appealed that decision to the Virgin Islands Board of Land Use Appeals ("VIBLUA"). *Id.*, ¶11.

[4] Further, because the motion challenged subject matter jurisdiction under V.I.RCiv.P.12(b)(1), the Superior Court was entitled to rely upon documents submitted by the parties. V.I.R.Civ.P. 12(d).

In a June 2016 order, VIBLUA affirmed the grant of permits but ordered that the two permits be consolidated into one even though the land aspect of the permit had never been reviewed under the submerged land standard as required by 12 V.I.C. § 911(b)(1). APPX–42, ¶12 (VIBLUA decision). VICS and the Church each filed writs of review challenging VIBLUA's decision.[5] *Id.*, ¶13–14. One of the issues asserted in the petitions for writ of review was that SEG had not established that it had the legal interest necessary to develop *any* of the parcels it sought to develop (Parcel Nos. 10-17, 10-18, 10-19, 10-41 Rem., 13A. 13B and 13 Rem. Estate Carolina, St. John).

More than three years later, the consolidated permit ordered by VIBLUA still had not been issued.[6] In an apparent effort to move the process along, SEG sent a letter to Governor Albert Bryan on December 3, 2019 with a "draft modified permit for Land and Water uses" and explained that the proposed modifications included removing Parcels 13A

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[5] These are the writ of review proceedings described in the Statement of Related cases.

[6] There has never been any explanation as to why the CZM Committee did not issue a consolidated permit in the more than three years after the VIBLUA decision.

& 13B from the project. APPX–50 (Dec. 3, 2019 letter).

Two weeks later, on December 16, 2019, the Chairman of the St. John Committee of the CZM Commission signed "Consolidated Major Coastal Zone Management Permit Nos. CZJ–4-14(W) & CZJ-03-14(L)." APPX–55. This permit did not remove Parcels 13A and 13B and thus was not based upon the proposed permit submitted by SEG. Instead, it combined the land and water permits that had been issued in 2014 and which had been ordered consolidated by VIBLUA. APPX–43, ¶18. The consolidated permit authorized SEG to build marina infrastructure, a restaurant, retail spaces, office spaces and other structures on Parcel Nos. 10-17, 10-18, 10-19, 10-41 Rem., 13A. 13B and 13 Rem. Estate Carolina, St. John and including the waters extending more than halfway across Coral Bay. APPX–30 (FAC, ¶8). The parcels are shown in Figure 2.04-1 of SEG's Environmental Assessment Report for the Major Land Permit:[7]

[7] The EAR is incorporated by reference in the Consolidated Permit. *See* APPX–56.

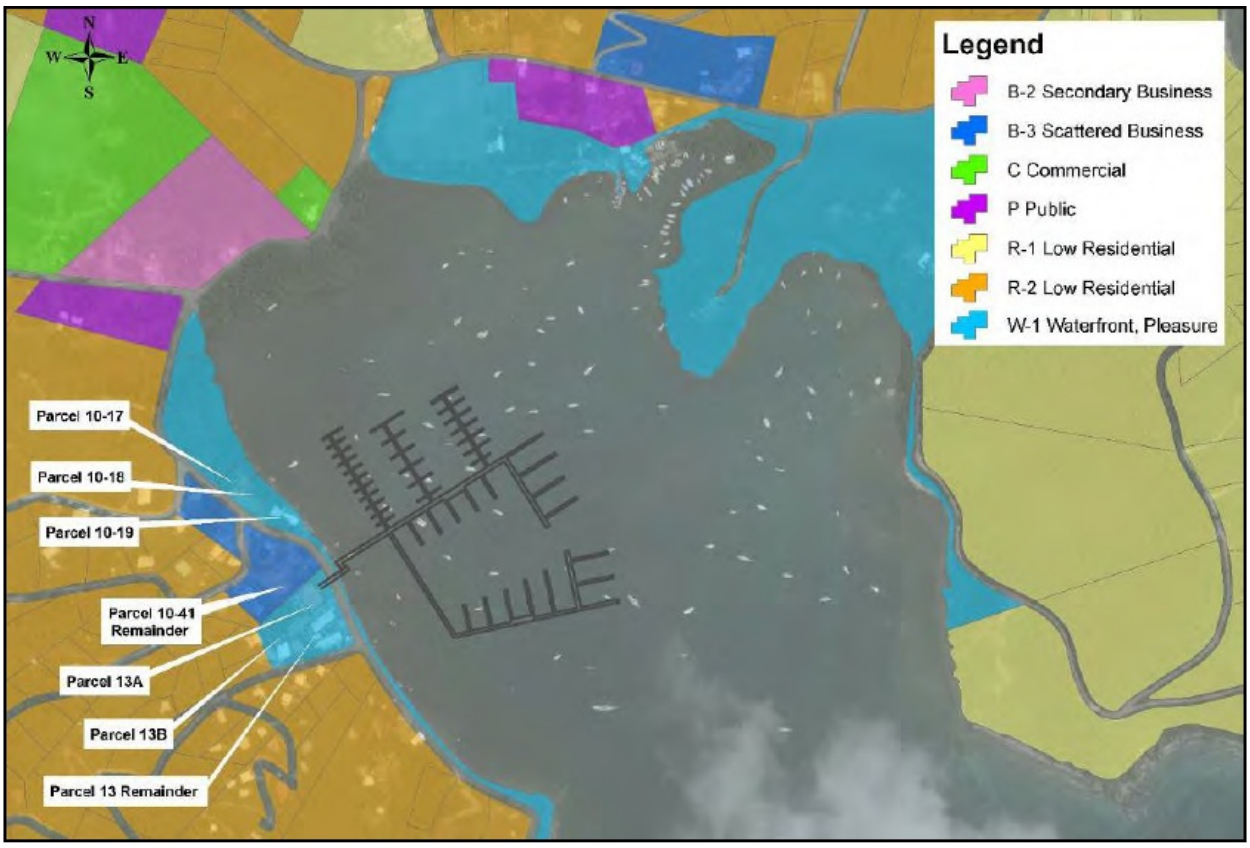

Figure 2.04-1. Agency Review Map

Thus, the consolidated permit authorized the construction of a marina and related shore facilities in Coral Bay, St. John, *including on Parcels 13A and 13B*—which SEG had admitted only two weeks earlier it did not control.[8] APPX–50. This permit also authorized SEG to destroy most of the structures on the two parcels (that it did not own) and to build other

[8] SEG claimed that it had become "too expensive" to keep these properties in the project. APPX–50. The petitioners in the writ of review proceedings assert that SEG did not have control of the properties at least as early as the time of the public hearing on the permit in 2014 and that even when SEG submitted the permit application in April 2014, it did not include proof of the required control.

structures, including a waste water treatment plant, on the two parcels—despite the fact that SEG had no legal right to do *anything* on the two parcels. APPX–30 (FAC, ¶¶10–12).

Notwithstanding SEG's December 3, 2019 admission (APPX–50) that it had no control over at least two of the parcels in the CZM permit, SEG signed and accepted the consolidated permit as permittee on December 17, 2019. APPX–63 (signature page on permit) and APPX–31 (FAC, ¶13).

On December 18, 2019, only two days after the CZM Committee Chairman signed the permit, the Governor approved the permit under the authority set forth in 12 V.I.C. § 911(e). APPX–64 (approval page of permit). But, the Governor clearly knew that the permit was deficient—on the same day that he approved the permit, the Governor issued a purported modification of the permit claiming that significant environmental harm would occur if he did not modify the permit he had just approved. APPX–65 (Governor's modification letter) and APPX–31 (FAC, ¶¶14–15). The Governor noted that the modifications were *requested by* SEG and stated that the modifications were "in the public interest" and were "necessary to prevent significant environmental

damage to coastal zone resources," and would "protect the general welfare by minimizing the impact to the environment." APPX–65 (December 18, 2019 modification letter); APPX–31 (FAC, ¶15). The Governor's modifications removed Parcels 13A and 13B from the permit. APPX–65 (December 18, 2019 modification letter); APPX–31 (FAC, ¶16).

The modifications that were initially described and requested by SEG in its December 3, 2019 letter (APPX–50)—and which were not included in the permit signed by the CZM Committee Chairman—were instead adopted as modifications to the permit by Governor Bryan. Contrary to the requirements of 12 V.I.C. § 911(g), the Governor's modification did not provide an effective date for the modification; nor did it give SEG a deadline to correct the deficiencies that the modification was supposedly addressing.

The modifications requested by SEG and authorized by the Governor included the following:

- Removal of Parcels 13A and 13B from the permit. APPX–66 (Governor's modification letter).
- Additional cisterns were authorized to be built on the Remainder of

Parcel 13 "to maintain the necessary water supply." *Id.*

- Relocation of a generator from Parcel 13A to Parcel 10-41. *Id.*
- Construction of a "shoreline boardwalk", thereby authorizing previously unauthorized occupancy of submerged lands of the Territory without any environmental review and without changing the lease payments calculated for the submerged land permit in 2014. *Id.*

Critically, *and conveniently omitted from any description of the modification*, the removal of Parcels 13A and 13B eliminated a key environmental feature that SEG had designed as a means of mitigating the overall impact of its development: The shunting of runoff from a major portion of the Coral Bay watershed into a catchment basin designed to capture silt and other pollutants before they reached Coral Bay. APPX–31 (FAC, ¶20). The design used a portion of Parcel 13A for the drainage ghut from the watershed into the catchment basin. The modification eliminated this mitigation feature and therefore substantially altered the scope of the project *in a manner that was harmful to the environment*. *Id.*

The Governor's unilateral decision to allow the construction of cisterns on Rem. Parcel 13 was done without any environmental review and

without any assessment of the impact of constructing the cisterns on that parcel. Nothing in the plans incorporated in the consolidated permit authorized the construction of such cisterns on that parcel. APPX–32 (FAC, ¶21). Morever, the Governor's modification authorized the construction of a "shoreline boardwalk" even though there were no plans for this boardwalk incorporated in the consolidated permit. Further, the Governor authorized at least part of the boardwalk to be constructed upon the submerged lands of the Virgin Islands. APPX–32 (FAC, ¶¶22–24).

Despite the fact that the consolidated permit, as modified, now allowed for additional occupancy on submerged lands, the modification made no allowance for rental fees as required by 12 V.I.C. § 911(f)(1). APPX–32 (FAC, ¶¶25–26). There was no environmental assessment done of *any* of the changes made through the Governor's modification. APPX–33 (FAC, ¶¶27–28).

In his transmittal letter submitting the consolidated permit and modification to the Legislature, APPX–68, the Governor *inaccurately represented to the Legislature* that "[a]ll of these changes [the modifications] fall within the category of minor amendments, as they are

either reductions in impact, or the provision of additional benefits to the public and environment." The Governor did not disclose to the Legislature that the removal of Parcels 13A & 13B would result in the elimination of the land needed for the drainage of the watershed into the catchment basin rather than into Coral Bay. Nor did the Governor reveal that the environmental impact of installing the boardwalk that he had unilaterally authorized had *never* been reviewed in the CZM permitting process. The Governor also neglected to modify the lease payments for the project even though the boardwalk would be installed on submerged lands. Finally, the Governor did not inform the Legislature that his unilateral decision to authorize the transfer to other parcels of the cisterns, wastewater treatment plant and generator that were all originally proposed for Parcels 13A and 13B had not gone through the CZM permitting process. APPX–30 (FAC, ¶¶17-19).

On December 11, 2020, the Legislature expressly ratified

> 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.

APPX–71 (Act 8407).

Act 8407 as approved by the Legislature included the Governor's letter to SEG modifying the permit and the consolidated permit but did not include the Governor's cover letter or any of the attachments to the cover letter. APPX–71 (Act 8407).

B. PROCEEDINGS BELOW

On July 21, 2020, Save Coral Bay filed its complaint challenging the Governor's modification. In response to a motion to dismiss, Save Coral Bay amended its complaint as a matter of right and the First Amended Complaint (APPX–28) is the operative complaint in this matter.

On November 4, 2020, SEG filed a second motion to dismiss. After the motion was fully briefed and oral argument, the Superior Court granted SEG's second motion to dismiss on May 12, 2021. APPX–4.

ARGUMENT

SUMMARY OF ARGUMENT

In the Superior Court, Save Coral Bay argued that the Governor's modification of the CZM permit was outside of the scope of his statutory powers and therefore *ultra vires* and void *ab initio*. Because the modification was void *ab initio*, there was no modification that the Legislature could ratify. The Superior Court erred because it concluded that the Governor's power to modify the permit had almost no limitations.

The Superior Court compounded this error when it concluded that the Legislature's ratification of the modification essentially cured any defects in the Governor's modification. An ultra vires act cannot be cured through ratification.

ISSUE 1:

> The Governor is authorized under 12 V.I.C. § 911(g) to modify a CZM permit if "it is necessary to prevent significant environmental damage to coastal zone resources." Here, the Governor modified SEG's permit as a convenience to (and at the request of) SEG and not for the purpose of preventing significant environmental damage. Because the Governor's action did not meet the criteria of the statute, his action was *ultra vires* and the modification was *void ab initio*. The Superior Court erred when it held that there were no limitations upon the Governor's power to modify a permit.

The Governor is given limited power to modify a CZM permit by 12 V.I.C. § 911(g). Subsection 911(g) has a number of limitations:

- It is a power "[i]naddition to any other powers of *enforcement* set forth in [12 V.I.C. § 913]." (Emphasis added.)
- It only applies to permits that "include[] development or occupancy of trust lands or submerged or filled lands.
- The Governor must make "a written determination that [modification or revocation] 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." (Emphasis added.)
- The Governor's written determination "shall be delivered both to the permittee and to the Legislature, *together with a statement of the reasons therefor."* (Emphasis added.)
- The Governor's written determination "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."

- The modification only becomes effective "[i]f the permittee shall fail to correct or establish the inaccuracy of such deficiencies or reasons within the time provided" in the Governor's written determination.

Subsection 911(g)'s introductory phrase suggests the limited purpose behind the section: It is in addition to "any other powers of enforcement." Consistent with this limitation, the Governor may *only* modify a permit if doing so "is necessary to prevent significant environmental damage to coastal zone resources and to protect the public health, safety and general welfare."

The governor's power to modify a permit is not designed to cure deficiencies before a permit is finalized. Before the permit is final, there is no danger of significant environmental damage. Consequently, subsection 911(g) only allows the governor to modify a permit that was "approved pursuant to this section." A permit is not final under "this section" until it is ratified by the Legislature. 12 V.I.C. § 911(e). Thus, as recognized in *West Indian Co. v. Gov't of Virgin Islands*, 844 F.2d 1007,

1012 (3d Cir. 1988), "[a] coastal zone permit for public lands may be modified or revoked *during its term*, upon a determination by the Governor that revocation or modification is in the public interest and necessary to prevent significant environmental damage") (emphasis added).

That subsection 911(g) only applies to permits that are fully approved is further shown by the language in the subsection requiring the governor to set a deadline for the permittee to correct the environmental deficiency *before the modification takes effect*.[9] Thus, the modification is not supposed to be a corrective to aid a permittee in *obtaining* a permit—it is intended to force a permittee to halt environmental damage as part of the "other powers of enforcement" available to the government.

The Superior Court fundamentally misunderstood subsection 911(g). The court stated that "*[p]rior to ratification*, § 911(g) confers upon the Governor the authority to modify or revoke *any* coastal permit." (Emphasis added.) APPX–10 (Mem. Op.). Contrary to this statement, and

[9] "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." 12 V.I.C. § 911(g).

as shown above, the power to modify is limited to fully approved permits and only applies in limited circumstances where the modification is needed "to prevent significant environmental damage."[10] Because the court misunderstood the limitations upon the modification power granted by subsection 911(g) and essentially considered the powers to be unlimited if they were exercised before ratification, it did not discuss (or seemingly rejected without considering) Save Coral Bay's argument that the Governor had exceeded his authority.

A. THE GOVERNOR'S ACTION WAS *ULTRA VIRES*.

An *ultra vires* act is an act by a body of authority that exceeds the scope of its authority. *Douglas v. Transportation Services of St. John, Inc.*, 72 V.I. 446, 453, ¶5 (Super. Ct. 2020). When the executive branch oversteps the authority prescribed by the legislature, the act is *ultra vires*. *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 291 (2013). *See also Barnhart v. City of Fayetteville, Ark.*, 900 S.W.2d 539, 545 (Ark. 1995) (holding that when municipality entered into contract outside of its statutory authority,

[10] The court's statement was also incorrect because the power to modify is also limited to submerged land permits and thus would not apply to a land permit.

the contract was *ultra vires* and *void ab initio*, and "not subject to ratification"); *Wellswood Columbia, LLC v. Hebron*, 992 A.2d 1120, 1134 (Conn. 2010) (stating that a municipality's acts in excess of its delegate powers are *ultra vires* and void *ab initio*); *Sch. Bd. of Amherst Cty. v. Burley*, 302 S.E.2d 53, 55 (Va. 1983) (failure to follow statutory requirements was *ultra vires* and made action void *ab initio*).

"Void ab initio is defined as null from the beginning." *Conlin v. Mortg. Elec. Registration Sys., Inc.*, 714 F.3d 355, 361 n.6 (6th Cir. 2013) (internal quotation marks and italics omitted); BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "void ab initio" as "[n]ull from the beginning, as from the first moment when a contract is entered into."). *See also Government of the Virgin Islands v. Durant*, 49 V.I. 366, 374 (2008) (quoting with approval statement in *In re Richards*, 52 F.Supp.2d 522, 528 (D.V.I. 1999) that when a court exceeds its rule-making authority, its action is "*ultra vires* and void"); *United Steelworkers, Locs. 8248 & 8249 v. Gov't of Virgin Islands, Div. of Pers.* 2021 V.I. Super. 12, ¶5, 2021 WL 412162 at *2 (Super. Ct. 2021) (holding that any PERB practice that does not strictly conform to its statutory mandate is *ultra vires* and void).

In this case, the Governor ignored the requirements of the statute and exceeded his powers: the permit was not final; he did not specify a date for SEG to correct the deficiencies; and, most important, the Governor's corrective action was not "necessary to prevent significant environmental damage." Consequently, the Governor's action was *ultra vires*.

Because the Superior Court believed that the Governor's power to modify a permit prior to ratification was virtually limitless, it engaged in no analysis as to whether or not the Governor complied with subsection 911(g). Although Governor Bryan's December 18, 2019 letter asserted he was exercising the power to modify a permit granted to him under 12 V.I.C. § 911(g) to modify a permit, his finding that the permit would cause significant environmental damage—a finding required by the statute—is clearly unsupportable. First, the major modification to the permit was to remove Parcels 13A and 13B. Yet the CZM Committee had issued the permit authorizing the construction on those two parcels and the Board of Land Use Appeals had upheld that decision. Unless these two agencies had made major errors in approving/affirming the permit,[11] how could it

[11] Which is what is asserted by the petitioners in the writ of review proceedings.

be that such a permit could possibly result in significant environmental damage? And if the agencies did not err in issuing/affirming the permit, then the Governor's claim that significant environmental damage would occur if he did not remove Parcels 13A and 13B from the permit was fallacious. Indeed, how could the Governor approve the permit under the CZM Act *on the same day* that he concluded that the proposed development would cause significant damage requiring that he modify the document he had just approved?

Second, subsection 911(g) requires that the Governor make a written determination that the modification "is necessary to prevent significant environmental damage." The Governor's modification letter attempts to justify his determination by stating,

> "I find that the requested modifications is [sic] in the public interest, that it is necessary to prevent significant environmental damage to coastal zone resources, and to protect the general welfare by minimizing the impact to the environment as follows:
>
> - Virtually eliminate the current common practice of noncompliant boaters dumping their untreated wastewater and solid waste into the waters of the harbor. This will be accomplished through the St. John Marina providing both dockside and remote wastewater pumpout.

- The utilization of improved water quality with EPA approved fueling.

- Funding of a grant by the marina for the employment of a full-time DPNR enforcement officer for St. John to ensure compliance by boaters of regulations specifically designed to protect public health.

- Coordination through the Federal Emergency Management Administration (FEMA) for the receipt of emergency supplies and evacuation of injured, infirmed [sic] or elderly during natural disasters like hurricanes and earthquakes that cut off Coral Bay from Coral Bay [sic]."

APPX–65.

The first two bullet points relied upon by the Governor are accomplished through the construction of the marina—which is already approved. The removal of Parcels 13A and 13-4 and related modifications has nothing to do with noncompliant boaters dumping solid waste into the harbor. The removal of Parcels 13A and 13B has nothing to do with the fuel docks at the marina or fueling of vessels. *None* of the bullet points have any relationship to the removal of Parcels 13A and 13B or "were necessary to prevent significant environmental damage to coastal zone resources." Moreover, the Governor never explained how *adding* a

shoreline boardwalk was "necessary to *prevent* significant environmental damage." 12 V.I.C. § 911(g) (emphasis added).

B. THE GOVERNOR'S MODIFICATION WAS AN ILLEGAL VEHICLE TO ALLOW SEG TO AVOID HAVING TO RETURN TO CZM TO EITHER AMEND OR RESUBMIT ITS PERMIT APPLICATION.

It is also important to recognize that the Governor did not modify the "consolidated permit" on his own initiative. As the Governor's letter of December 18, 2019 acknowledges, SEG *requested* a modification to its permit. There is a separate procedure for an applicant or permitted to obtain a modification of an application or permit.

The CZM Commission, acting in accordance with 12 V.I.C. § 910(e) has created two procedures for modifications relating to CZM permits. The first is for amendments to *applications* for major CZM permits. Modifications to applications are governed by 12 V.I.R.&R. § 910-4(b), which allows amendments to applications for major CZM permits at any time within 30 days of receipt of the original completed application or at least 30 days before the public hearing, *whichever is earlier*. *Id.* Significantly, if a proposed amendment "would substantially modify the scope, nature or characteristics of the proposed development, the original

proposal shall be deemed withdrawn." 12 V.I.R.&R. § 910-4(c).

The second procedure is for modifications of *approved* CZM permits. A modification to an existing permit is governed by 12 V.I.R.&R. § 910-14. An application for the modification of an approved CZM permit "shall be treated as a new application for a Coastal Zone Permit *unless* the Commissioner [of DPNR] determines that such modification would not substantially alter or modify the scope, nature or characteristics of the existing permit or approved development." 12 V.I.R.&R. § 910-14(a) (emphasis added). Moreover, even if the Commissioner finds that the proposed modification would not substantially alter or modify the scope, nature or characteristics, the CZM Committee "may nevertheless impose such conditions to approval of the modification as it deems necessary" to satisfy the provisions of the VICZMA. 12 V.I.R.&R. § 910-14(b).

The Governor abused his authority when he modified the permit at the request of SEG instead of referring SEG to the permit modification process an applicant/permittee must follow. There is a critical public policy reason why this Court should declare—emphatically—that a governor may not abuse subsection 911(g) in this manner.

If the Governor's practice is upheld, it opens the door for even greater abuse of the process. Consider a governor's political crony who obtains a CZM permit to build a 25 foot long pier on submerged lands offshore of the crony's restaurant to allow diners to temporarily dock at the restaurant. After going through the CZM process and having the permit issued, approved by the Governor and ratified by the Legislature, the crony asks the Governor to modify the permit, saying, "If I am given a modification that allows me to extend the pier by 100 feet and put boat slips on either side so that I can rent them out to boat owners, my restaurant will be more profitable, which will allow me to afford a better grease trap—which is good for the environment." Under the reasoning employed by the Governor with respect to SEG, adding the 100 feet of pier and boat slips (without any environmental assessment report or review by CZM) can be justified by the Governor's determination that an improved grease trap will prevent significant environmental damage. And it is easy to obtain ratification if the Governor enjoys a close relationship with the Senate president. Subsection 911(g) provides for automatic ratification by the Legislature of the Governor's modification if the Legislature does not act upon the modification within 30 days. This allows the Senate president,

who controls the Senate's calendar, to prevent a recision vote within 30 days and thereby allow the ratification to occur as a matter of law.

The allegations of Save Coral Bay's complaint, if proven, show that the Governor's modification was *ultra vires*. The Court should reverse the decision below and remand with instructions to allow the case to proceed to the merits.

ISSUE 2:

> An *ultra vires* act (an act beyond the power)—unlike a defective *intra vires* act (an act within the power but procedurally defective)—cannot be ratified. Because the Governor's act was *ultra vires* (and thus void *ab initio*), the Legislature could not ratify it. The Superior Court erred when it held that the Legislature's ratification was "original authority" that essentially cured the Governor's *ultra vires* modification.

It is well-settled that when a corporation or government exercises power it properly possesses, *e.g.*, *intra vires* power, but there is a procedural defect in the exercise of that power, the otherwise invalid act

can be cured through ratification. "Acts that are *ultra vires* are void and may not be ratified, while *infra vires* acts may be. An act is *ultra vires* if the [governmental entity] was utterly without capacity to act. On the other hand, an *intra vires* act is one that is merely voidable for want of authority." *Grimes v. City of E. Orange*, 672 A.2d 239, 241 (N.J. App. Div. 1996) (cleaned up). Thus, as is frequently seen in the corporate setting, a corporation's act that is "approved" by a board of directors vote that lacked a quorum can be ratified by implication by the actions of the corporation or directly ratified by subsequent approval from the absent board members. *See, e.g.*, *CompoSecure, L.L.C. v. CardUX, LLC*, 206 A.3d 807, 819–20 (Del. 2018) (holding that defect in approval of contract could be cured by equitable defense of ratification); *South Tacoma Way, LLC v. State*, 233 P.3d 871, 873 (Wash. 2010) (observing the "distinction between government acts that are *ultra vires* and those acts that suffer from some procedural irregularity).

The Superior Court erred because it did not recognize the distinction between *ultra vires* acts that *cannot* be ratified and procedurally defective acts within the Governor's power that *could* be ratified. *See, e.g.*, *Barnhart*

v. City of Fayetteville, Ark., 900 S.W.2d 539, 545 (Ark. 1995) (holding that *ultra vires* act was void *ab initio*, and "*not subject to ratification*") (emphasis added).

In the decision below, the court relied upon *Monsanto v. V.I. Housing Authority*, 18 V.I. 113, 118 (Terr. 1982) to justify its conclusion that the Legislature's ratification was valid. APPX–11 (Mem. Op.). But, in *Monsanto*, while the Housing Authority had the power to take the action (termination of the executive director) it exercised that power at a meeting that had not been properly noticed. This procedural defect rendered the termination void, but not *ultra vires*. The Housing Authority cured this procedural defect by holding a properly-noticed meeting where it ratified the termination decision. The *Monsanto* court correctly recognized that this procedural defect could be cured through the subsequent ratification. 18 V.I. at 118. Importantly, however, the *Monsanto* court also recognized that ratification *could not occur* "in the limited occasion where the original action was *ultra vires*." *Id.* The Superior Court erred in this case because it did not recognize that the Governor's modification was *ultra vires* and therefore not capable of ratification by the Legislature.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Superior Court dismissing Save Coral Bay's complaint on preliminary grounds and remand with instructions to allow the case to progress to the merits.

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CERTIFICATIONS

BAR MEMBERSHIP

I am a member in good standing of the bar of this Court.

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SERVICE OF BRIEF

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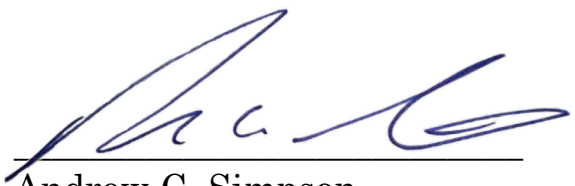

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As to all certifications