For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

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.	**S. Ct. Civ. No. 2021-0017** Re: Super. Ct. Civ. No. 298/2020 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas-St. John
Superior Court Judge: Hon. Renee Gumbs Carty

Argued: November 10, 2021
Filed: March 30, 2022

Cite as 2022 VI 7

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Andrew C. Simpson, Esq.
Andrew C. Simpson, P.C.
St. Croix, U.S.V.I.
Attorney for Appellant,

Ian S.A. Clement, Esq. (argued)
Christopher Miles Timmons Sr., Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee Governor Albert Bryan, Jr.,

Boyd L. Sprehn, Esq.
Law Office of John H. Benham, P.C.
St. Thomas, U.S.V.I.
Attorney for Appellee Summer's End Group, LLC.

OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Save Coral Bay, Inc. ("SCB") appeals from the Superior Court's May 12, 2021 order, which dismissed its request for a declaratory judgment and injunctive relief with respect to a Coastal Zone Management ("CZM") permit issued to Summer's End Group, LLC ("SEG"). For the reasons that follow, we affirm.

I. BACKGROUND

¶ 2 On April 4, 2014, SEG applied for a CZM permit to construct a new harbor development in Coral Bay, St. John, on seven land parcels, which would include a commercial marina, restaurants, retail establishments, and offices. SEG also applied for a water permit to develop 27.5 acres of submerged lands for a 145-slip marina, a 75-mooring mooring field, a pump-out station, and a fuel station, all seaward of the land parcels. The CZM Commission issued a letter of completeness on June 18, 2014, and the Commission's St. John Committee (the "Committee") collected public comments and held a public hearing on August 20, 2014.

¶ 3 The Committee ultimately approved both the water and land permits on October 24, 2014. However, two organizations—the Virgin Islands Conservation Society ("VICS") and the Moravian Church Conference of the Virgin Islands—filed appeals challenging the permits with the Board of Land Use of Appeals ("BLUA"). The BLUA subsequently affirmed the Committee's approval of the permits in a June 6, 2016 order, but ordered that the separate water and land permits be consolidated into a single permit. The VICS and the Moravian Church filed petitions for writs of review with the Superior Court challenging the BLUA's order, which currently remain pending.

¶ 4 Apparently recognizing that the Committee never transmitted any of the previously approved permits to the Governor of the Virgin Islands for approval pursuant to the CZM Act, *see*

12 V.I.C. § 911(e), the Chair of the Committee forwarded the water permit to Governor Albert Bryan, Jr. on March 27, 2019. Although Governor Bryan approved the water permit, the Legislature did not immediately take action to ratify it as required by the CZM Act, *see id.* While the approved permit was being considered by the Legislature, SEG wrote a letter to Governor Bryan, dated December 3, 2019, which noted that the BLUA had ordered the water and land permits consolidated into a single permit, and requested that he modify the water permit to reflect this. In addition, SEG requested that Governor Bryan further modify the permit to reflect changes that had been made to the proposed project in the intervening years, including the removal of two of the seven parcels, a reduction of parking spaces, the removal of a 56-seat restaurant and one mega-yacht slip, and the inclusion of a shoreline boardwalk.

¶ 5 Before Governor Bryan acted on SEG's request for modification, the Legislature, through its Senate President, issued a December 10, 2019 letter returning the permit to him. In his letter, the Senate President explained that he believed the permit was "improperly before the Legislature" since it had been transmitted to Governor Bryan by the Committee Chair unilaterally without a vote of the entire Committee, and because "the project described and approved in 2014 is no longer the project the applicant intends to develop today." (J.A. 53.) However, the Senate President "assure[d]" Governor Bryan that the Legislature "will act promptly" once "a new, valid, consolidated land and water permit for the marina project is transmitted for the Legislature's ratification." (*Id.)*

¶ 6 On December 16, 2019, the Committee consolidated the water and land permits in a manner consistent with the BLUA order, and transmitted the consolidated permit to Governor Bryan, who approved the consolidated permit on December 18, 2019. However, concurrent with his approval, Governor Bryan modified the consolidated permit, *see* 12 V.I.C. § 911(g), largely in

the manner requested by SEG and the Senate President. In a letter transmitted to SEG and the Senate President, Governor Bryan provided numerous reasons for making these modifications, which included reducing the size of the project and the time period of construction, reducing seafloor disruption, preserving potential historical resources, reducing runoff, utilizing improved water quality, and eliminating the common practice of noncompliant boaters dumping untreated wastewater and solid waste into the harbor.

¶ 7 Governor Bryan thereafter transmitted the consolidated permit, as modified, to the Legislature for ratification. The Senate President sponsored a bill, docketed as Bill No. 33-0428, for approval of the consolidated permit as modified, and the Legislature held a hearing on the bill on July 7, 2020, where it heard extensive testimony from interested parties, including opponents of the project.

¶ 8 On July 21, 2020, while the consolidated permit, as modified, was still being considered for ratification by the Legislature, SCB initiated an action for declaratory and injunctive relief against SEG and Governor Bryan, seeking to prohibit SEG from conducting any actions pursuant to the unratified permit. While that litigation was pending, the Legislature passed Bill No. 33-0428 on December 21, 2020, which ratified the consolidated permit. The Legislature transmitted Bill No. 33-0428 to Governor Bryan, which became Act No. 8407 when signed by Governor Bryan on December 31, 2020.

¶ 9 Based on this ratification, on January 8, 2021, SEG filed a motion to dismiss SCB's complaint for failure to state a claim and as moot, which Governor Bryan joined on the same day. SEG opposed the motion, contending that Governor Bryan lacked the statutory authority to modify the permit before it was ratified by the Legislature.

¶ 10 The Superior Court granted the motion to dismiss in a May 12, 2021 order, on the ground that the Legislature's ratification of the consolidated permit, as modified, rendered SCB's complaint moot.[1] SCB timely filed a notice of appeal with this Court on May 22, 2021. *See* V.I. R. APP. P. 5(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 11 This Court has jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C. § 1613a(d). This Court likewise has jurisdiction over cases that arise from a final order issued by the Superior Court. 4 V.I.C. § 32(a) ("The Supreme Court shall have jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law."). This is one such case because the Superior Court's dismissal of SCB's entire complaint constituted an appealable final judgment. *Grisar v. Am. Fed'n of Teachers*, 73 V.I. 491, 494 (V.I. 2020).

¶ 12 This Court exercises plenary review over applications of law and reviews findings of fact for clear error. *See St. Thomas–St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007).

B. Legislative Ratification

¶ 13 In its appellate brief, SCB asserts that the Superior Court erred when it dismissed its complaint as moot due to the passage of Act No. 8407. Relying on case law from other states,

[1] In his brief, Governor Bryan characterizes the Superior Court as having dismissed SCB's complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Virgin Islands Rules of Civil Procedure. However, as this Court has previously explained, "the mootness doctrine in the Virgin Islands is a non-jurisdictional claims-processing rule that has been incorporated into Virgin Islands law only as a matter of judicial policy." *Mapp v. Fawkes*, 61 V.I. 521, 530 (V.I. 2014) (collecting cases). As such, by dismissing SCB's complaint as moot, the Superior Court in effect dismissed it for failure to state a claim pursuant to Virgin Islands Rule of Civil Procedure 12(b)(6).

SCB maintains that the Legislature cannot ratify an action by the Governor which is contrary to statute. However, none of the cases SCB cites relate to ratification by the Legislature – rather, all involve ratifications of statutory violations made by municipalities, school boards, and other government entities, without any action by the jurisdiction's legislature. But this is not a case where Governor Bryan acted contrary to a statute and then he or another Executive Branch entity attempted to retroactively ratify his own conduct. Instead, this is a case where the Legislature ratified an action taken by Governor Bryan. Therefore, the proper inquiry is not into the power of Governor Bryan or the Executive Branch, but the power of the Legislature itself to excuse violations of the statutory law.

¶ 14 The Revised Organic Act of 1954 vests the "legislative power and authority of the Virgin Islands" in the Legislature, 48 U.S.C. § 1571, which "shall extend to all rightful subjects of legislation not inconsistent with [the Revised Organic Act] or the laws of the United States made applicable to the Virgin Islands." 48 U.S.C. § 1574(a). This is consistent with the well-established principle that the power to make the law is the quintessential legislative power. *See, e.g.*, *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) ("[T]he legislative power is the power to make law . . . ."); *see also Barrett v. Indiana*, 229 U.S. 26, 30 (1913) ("It is the province of the legislature to make the laws. . . ."); *see also Municipality of St. Thomas & St. John v. Gordon*, 78 F. Supp. 440, 443 (D.V.I. 1948) ("Legislative power . . . is the authority to make laws . . . .").

¶ 15 The Revised Organic Act prescribes a specific procedure for how a bill becomes a law, requiring that a bill be passed by the affirmative vote of the majority at a meeting of the Legislature with a quorum and either be signed by the governor or, if vetoed, over-ridden by a vote of two-thirds of the Legislature's members. *See* 48 U.S.C. § 1575. But outside of this express procedure,

the Legislature possesses exceptionally broad discretion in determining how it will exercise its power and authority to make the law. *See Mapp v. Lawaetz*, 882 F.2d 49, 54 (3d Cir. 1989).

¶ 16 This extraordinarily broad discretion includes how much deference—if any—the Legislature gives to existing laws when enacting new ones. It is well-established, both in the Virgin Islands and throughout the United States that, in the absence of a constitutional restriction,[2] "one legislature cannot abridge the powers of a succeeding legislature" by passing a law, adopting a rule, entering a contract, or taking some other action that irrevocably "surrenders an essential attribute of its sovereignty." *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 (1977) (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810)). In other words, "one legislature cannot enact irreparable legislation or limit or restrict its own power or the power of its successors," and "succeeding legislatures may repeal or modify acts of a former legislature." 82 C.J.S. *Statutes* § 337 (collecting cases); *see also Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938) ("The principal function of a legislative body is . . . to make laws which declare the policy of the state and are subject to repeal when a subsequent Legislature shall determine to alter that policy.").

¶ 17 This discretion also includes the form taken by the laws enacted by the Legislature. Many laws enacted by a legislative body take the form of codified statutes which are compiled and published—such as the United States Code or the Virgin Islands Code—often "featuring a systematic arrangement into chapters or articles and sections with subheads, table of contents, and index for ready reference." 82 C.J.S. *Statutes* § 321. But these codes, while representing an extraordinarily convenient method to access and cite to the laws contained therein, are precisely

[2] For instance, although the Legislature possesses the authority to confirm a judge of the Superior Court, a subsequent legislature cannot remove a judge from office because doing so would be contrary to the separation of powers principles of the Revised Organic Act. *Kendall v. Russell*, 572 F.3d 126, 136 (3d Cir. 2009).

that—a convenience—since statutes included in a code "have no higher standing or sanctity" than any other law passed by the legislature of that jurisdiction. *See Los Angeles County v. Payne*, 66 P.2d 658, 664 (Cal. 1937); *see also Cohhn v. Maryland-National Capital Park & Planning Comm'n*, 2017 WL 4711944, at *5 (Md. Oct. 18, 2017) (unpublished) ("[P]rovisions of the law need not be codified in order to have legal effect.") (citing *Doe v. Roe*, 20 A.3d 787 (Md. 2011)). The same holds true for repeal or amendment of a law, for "[i]n the absence of any constitutional restraint, a state legislature may exercise the power of repeal in any form in which it can give a clear expression of its will." 82 C.J.S. *Statutes* § 338 (collecting cases). Thus, the Legislature may repeal or amend a law codified in the Virgin Islands Code by enacting a law which is not codified in the Virgin Islands Code. *See, e.g., Simmonds v. People*, 59 V.I. 480, 493 (V.I. 2013) (recognizing the legislative repeal of the Uniform Rules of Evidence, which had been codified in title 5, chapter 67 of the Virgin Islands Code, and their replacement with the Federal Rules of Evidence, with such replacement not codified in the Virgin Islands Code).

¶ 18 This is precisely what the Legislature did in this case. Pursuant to the Revised Organic Act, a bill becomes a law if it is passed by the Legislature and signed by the Governor. 48 U.S.C. § 1575. The Senate President sponsored and introduced Bill No. 33-0428, and it was passed by the Legislature on December 21, 2020. Bill No. 33-0428 was transmitted to Governor Bryan, who signed it into law on December 31, 2020, as Act No. 8407. Even if this Court were to assume—without deciding—that this procedure differs from that set forth in the CZM Act, the passage of the CZM Act by an earlier legislature could not deprive the 33rd Legislature and Governor Bryan of their constitutional authority to change that law in the manner provided for in the Revised Organic Act. Whatever the merits of SCB's claims under the law as it existed at the time it filed

its complaint, the subsequent enactment of Act No. 8407 rendered those claims moot. Therefore, we affirm the Superior Court's May 12, 2021 order.

III. CONCLUSION

¶ 19 The Revised Organic Act sets forth a procedure for how a bill becomes a law, and that procedure was followed with respect to Act No. 8407. Because one legislature cannot bind a subsequent legislature by enacting unrepealable or unmodifiable super-legislation, it is irrelevant whether the procedure set forth for modification of permits in the CZM Act was followed, since the 33rd Legislature was entitled to pass, and Governor Bryan entitled to sign into law, new legislation, whether generally or limited to a specific permit. Accordingly, we affirm the Superior Court's May 12, 2021 dismissal order.

Dated this 30th day of March, 2022.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/ Reisha Corneiro
Deputy Clerk

Dated: March 30, 2022