

Senator \_\_\_\_\_  
Committee on Economic Development, Agriculture & Planning  
Legislature of the Virgin Islands  
St. Thomas, U.S. Virgin Islands 00804

November 13, 2014

cc: Members of the Committee on Economic Development, Agriculture & Planning

Dear Senator \_\_\_\_\_:

I am writing to you and the other members of the Committee on Economic Development regarding a Trust Lands Lease agreement which has recently been signed by the Governor and may soon be brought to your committee for consideration. This Trust Lands Lease is for 27.5 acres of submerged land in Coral Bay Harbor, St John, and is pursuant to a CZM Major Water Permit issued to the Summers End Group, LLC, for construction of a large marina in Coral Bay Harbor. This permit, and a related Major Land Permit, were approved by a vote of the St John CZM Committee on October 1, 2014. I am urging you not to rush to a decision on such an important matter, and to defer it to the 31st Legislature, if that is necessary, in order to give the matter the proper review and attention that it deserves.

#### **Executive Summary**

There were a multitude of serious issues involved in the final two-person vote to approve the permits for the Summers End Group, including conflict of interest by one of the committee members present at the meetings, serious errors and omissions in the permit documents, lack of required Water Quality Permits, inadequate economic and environmental analysis and violations of the Boating Act, to name just a few. All of these issues are being addressed in a timely appeal to the Board of Land Use Appeals, which will be filed this week.

Considering that the Governor apparently wishes this submerged lands lease to be brought to the 30th Legislature for ratification in very short order, I wanted to bring your attention not only to the imminent BLUA appeal, but also to violations of Virgin Islands law pertaining to the computation of lease fees for submerged Trust Lands and ceding operation of a designated mooring facility to a private entity. These serious questions of legality, not to mention the thoroughly inadequate analysis of environmental impacts, should be more than sufficient reason to undertake significant due diligence on the permit, and not rush it through in the remaining weeks of the 30th Legislature.

As further detailed below, here are some key concerns with this permit:

- The lease fee agreed between DPNR and the Summers End Group was a small fraction of what the statute requires, and was not based on fair market value. The proper lease fee would be somewhere between \$700,000 and \$1,850,00 per year. The fee agreed with the Summers End Group was \$194,000 per year, a discount amounting to over \$20 million during the life of the lease.
- The inclusion of a designated mooring field in the permit is an express violation of the Virgin Islands Boating Act, which relegates that authority exclusively to DPNR.
- No development can begin until the US Army Corps of Engineers completes its multi-agency environmental review, a process which typically takes years to complete. As such there is no

urgency in ratifying this submerged lands permit and lease, and it would be prudent to defer to the 31st Legislature rather than rush it through without adequate review of the issues raised in this note.

Each of these points are discussed in more detail in the pages that follow.

### **Analysis of Permit Deficiencies - Basis for Computation of Lease Fees**

The computation of Trust Lands lease fees are subject to the statutory requirements of VIRR 910-5(e). This section stipulates, among other things, that the basis for negotiation of the fees should be attached to the lease or permit (including the computation of fair market value and/or other factors on which the fees are based). It is further required that any waiver or reduction in fees must be rendered in writing, with the reasons specified, and attached to the permit or lease when transmitted to the Governor for approval, and to the Legislature for ratification.

I requested copies of the Summers End Group (SEG) permits from DPNR pursuant to 12 VIC § 910(d)(4), and received those copies after two subsequent follow-up requests on November 3, 2014. Notably, this is the same date that the permits were delivered to Government House for review by the Governor. They had been signed by CZM on October 24, but no notice was provided of that fact to me or anyone else that I am aware of, other than the applicant. There were no attachments provided to me, and after several requests to DPNR I was told that the requested attachment relating to the basis for negotiation of lease fees, required under VI code, either did not exist, or would not be provided.

I would like to make the following points, which I believe are serious legal defects in the Summers End Group permit documents and should render them unfit for signature by the Governor or ratification by the Legislature:

1. The annual "rental fee" for the 27.5 acres of submerged Trust Lands has been determined by DPNR to be \$194,026 once the project is complete and \$64,027 prior to that point. Although required by law, the basis for the calculation of this lease fee, including the factors considered, was not attached to the permit provided to me, and presumably not provided to the Governor. If such basis for calculation was provided as part of the permit, it was required to have been given to me pursuant to my request and certainly to the Legislature prior to ratification.
2. The acreage of the submerged Trust Lands occupied by the developer pursuant to the permit is stated incorrectly in the permit and lease. The marina encompasses the 27.5 acres as specified in the permit. However the project described in the permit includes a "mooring field of up to 75 moorings", and this mooring field according to the applicant's rough drawings encompasses an additional 10-15 acres. The acreage of the mooring field has not been included in the permit or lease computation, nor has it been stated in any document, to my knowledge, by the applicant or DPNR.
3. It appears as though a very significant fee reduction was given to this applicant and yet the permit provided to me includes absolutely no documentation on the basis for the agreed fee. The code is explicit: VIRR Section 910-5(e) states "**rental fees ...shall be based on the fair**

**market value of the land or improvements, gross receipts of commercial operations, and any other factors that may be pertinent thereto; provided however, that the weight being given to the criteria used shall be attached to the lease or permit..."**

4. On the basis of this code requirement, I have computed the fair market value of the land as required by law. The standard basis for determining fair market value for Virgin Islands submerged Trust Lands lease agreements is to use the per-acre value of the associated upland parcels (based, for example, on assessed value), and then apply this value to the acreage of the submerged lands. A factor, typically 12%, is used to amortize the fair market value into an annual payment. This calculation is then normally attached to a submerged land lease as required by the law.
5. My calculation of fair market value ("FMV") for the submerged lands of the Summers End Group project was based on three different objective land value metrics, and the results of that calculation are shown in the table below, as well as in the detailed Attachment A to this letter. The three methods of computing Fair Market Value (FMV) are:
  - a. using the **assessed value of the actual land parcels** on which the land portion of the marina is being developed, and
  - b. the actual **price at which comparable unimproved land parcels have recently been sold** in Coral Bay, and
  - c. the **assessed value of land parcels elsewhere in Coral Bay** of roughly the same size as the marina parcels. This data is shown in the table below.

<b>Market Value Method</b>	<b>FMV Per Acre</b>	<b>Value of Submerged Lands (27.5 acres)</b>	<b>Annual Lease Fee (at 12% per annum)</b>
a) Assessed Value of Marina Upland Parcels	\$412,281	\$ 11,337,734	<b>\$1,360,528</b>
b) Recent Sales of Land in Coral Bay (Unimproved)	\$239,437	\$6,515,385	<b>\$781,846</b>
c) Assessed Value of Large Land Parcels in Coral Bay (Unimproved)	\$139,578	\$4,289,582	<b>\$ 514,750</b>

6. Based on this objective FMV analysis, the annual lease payment for the 27.5 acres of submerged Trust Lands should have been between \$514,750 and \$1,360,528 which, according to VIRR 910-5(e) should be the minimum value of the annual lease payment, unless a waiver is granted. If the FMV were applied to the entire submerged land area used by the applicant (including 10 acres of Mooring Field), then the correct range for the lease payment should have been **between \$701,932 and \$1,855,266 per year.**
7. The "agreed" lease payment of \$194,026 represents a discount of \$1,013,758 per year, equivalent to a discount percentage of 84%, from the lease payment based on Fair Market Value (using the average of the three FMV calculation methods). There is no explanation for this

substantial discount that would apply over the 20 years of the lease. Such an explanation is explicitly required under VIRR 910-5(f).

8. In a period when the economy of the territory is struggling, when individual homeowner property taxes are rising, the grant of a fee reduction to a private developer amounting to over \$20 million over 20 years is unconscionable. I am hoping there is a good explanation for this. But barring such explanation, and given the lack of documentary evidence of the calculation, the Trust Lands Lease agreement is in clear violation of the law of the Virgin Islands.

### **Analysis of Permit Deficiencies - Legality of Private Control of Public Mooring Field**

In addition to the 145 slip marina, the Summers End Group permit includes the right for the developer to build and operate a Mooring Field of up to 75 moorings in Coral Bay harbor. Although the CZM permit application contained virtually no technical description of this facility, no impact assessments, no surveys, and none of the requirements of the code to deem such an application complete, nonetheless CZM approved this request and it is now part of the submerged Trust Lands Lease agreement submitted to the Governor and Legislature for approval.

Ceding the development and operation of a designated mooring facility to a private operator, without input from any members of the affected community, is a clear violation of the Boating Law.

1. The right and responsibility to develop mooring fields sits solely with DPNR itself (25 V.I.C. § 404(a)): **"The Department shall develop and implement a mooring plan, subject to the approval of the Legislature's Committee on Planning and Natural Resources. ...The Department shall work with the appropriate Ad-Hoc Community Committee for each designated mooring and anchoring area."**
2. There has been no mooring plan for Coral Bay harbor approved by the Legislature. The current proposal for private operation of the Coral Bay mooring field has had no input from any Ad-Hoc Community Committee, in spite of repeated efforts on the part of the Coral Bay boating community to meet with DPNR for this purpose.
3. The drawings, which were described in public hearings as "rough sketches, subject to change" have been universally derided by all experienced mariners as showing absolutely no knowledge of the structure and engineering of mooring fields. The mooring locations are too closely packed, are in the wrong parts of the harbor, and would result in severe damage to boats and habitat in the case of a storm event.
4. The Governor and the Legislature cannot, under the VI Code, approve this transfer of a government function to a private entity. Particularly with the evidence that the private entity has no experience or knowledge of appropriate mooring practices, such a transfer would undoubtedly be challenged in the courts.

### **There Should be No Rush To Approve This Permit**

Rather than act prematurely on a permit application with a large number of potential problems, it would be prudent to take the time to review the issues raised in this letter and act when all concerns have been addressed. It is important to note that, according to the terms of the permit and according to federal law, the developments contemplated by this Major Water Permit cannot be initiated until approval is received from the US Army Corps of Engineers (USACE). It is extremely likely that the USACE review will require extensive changes to the current application, and such review, involving additional analysis and environmental studies, could take years to complete. Deferring consideration of this submerged Trust Lands permit until the issues identified are addressed will not delay the project, but will provide opportunity for a more in-depth analysis of concerns.

The VI CZM Act includes a provision whereby the Governor may rescind any Trust Lands permit if he or she finds that it is in the public interest to do so. 12 V.I.C. § 911(g) states: "**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.** "

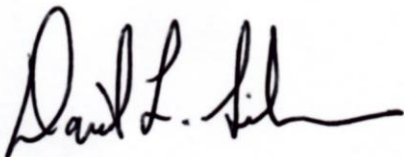
With the new government being seated in January 2015, and a new Governor, it would seem prudent to allow the new administration to review and approve, or deny, the permits for the Summers End Group. If the new Governor were to disagree with the conclusions of the current Governor, or of the 30th Legislature, then the entire process could be reversed in a matter of months. To avoid such a disruptive action it seems best to give the new Legislature the ability to decide on these permits, and to live with the consequences of their own decisions.

### **Conclusions**

Based on the foregoing, it is my strong recommendation that consideration of the submerged Trust Lands Lease requested by the Summers End Group be deferred until after the Board of Land Use Appeals has had an opportunity to hear the case, and until the irregularities in the lease fee have been resolved, and until the 31st Legislature is seated.

To do otherwise would be a disservice to the people of the Virgin Islands.

Respectfully yours,

A handwritten signature in black ink, appearing to read "David L. Silverman". The signature is fluid and cursive, with a long horizontal stroke at the end.

David Silverman, Resident, Coral Bay, St John  
9901 Emmaus, St John, 00830  
340.776.6326

**ATTACHMENT A - SUBMERGED LAND LEASE CALCULATION**

<b>Fair Market Value of Submerged Lands (Excluding Mooring Field)</b>				
<b>Method</b>	<b>\$/Acre</b>	<b>Acres</b>	<b>Total Value</b>	<b>Annual Lease Pmt</b>
Marina Upland Parcels	\$ 412,281	27.5	\$ 11,337,734	\$ 1,360,528
Recent Land Sales	\$ 236,923	27.5	\$ 6,515,385	\$ 781,846
Large Undeveloped Parcels	\$ 155,985	27.5	\$ 4,289,582	\$ 514,750
<b>Fair Market Value of Submerged Lands Including Mooring Field)</b>				
<b>Method</b>	<b>\$/Acre</b>	<b>Acres</b>	<b>Total Value</b>	<b>Annual Lease Pmt</b>
Marina Upland Parcels	\$ 412,281	37.5	\$ 15,460,547	\$ 1,855,266
Recent Land Sales	\$ 236,923	37.5	\$ 8,884,615	\$ 1,066,154
Large Undeveloped Parcels	\$ 155,985	37.5	\$ 5,849,430	\$ 701,932
<b>"Agreed" Lease Payment</b>				<b>\$ 194,026</b>
<b>Lease Payment based on Average FMV</b>				<b>\$ 1,207,784</b>
<b>Discount Amt (per annum)</b>				<b>\$ 1,013,758</b>
<b>Discount Percent</b>				<b>84%</b>
<b>20 Year Discount</b>				<b>\$ 20,275,154</b>

<b>Marina Upland Parcels</b>	<b>Land Assessed Value</b>	<b>Acreage</b>	<b>\$/acre</b>
10-17 Carolina	\$ 77,000	0.29	
10-18 Carolina	\$ 69,100	0.26	
10-19 Carolina	\$ 132,200	0.24	
10-41 Rem Carolina	\$ 413,400	1.00	
13-A Carolina	\$ 203,900	0.37	
13B Carolina	\$ 62,700	0.23	
13 Carolina	\$ 361,000	0.81	
<b>Total</b>	<b>\$ 1,319,300</b>	<b>3.20</b>	<b>\$ 412,281</b>
<b>Recent Land Sales</b>	<b>Sold Price</b>	<b>Acreage</b>	
6G1 Carolina	\$ 85,000	0.52	
10-27-4A Carolina	\$ 86,000	0.28	
4-3 Carolina	\$ 210,000	0.61	
8-4-3 Carolina	\$ 118,000	0.50	
18B-4 Carolina	\$ 85,000	0.57	
6-3-123 CAROLINA	\$ 120,000	0.50	
6-3-16 CAROLINA	\$ 75,000	0.50	
107A CAROLINA	\$ 145,000	0.42	
<b>Total</b>	<b>\$ 924,000</b>	<b>3.90</b>	<b>\$ 236,923</b>
<b>Large Undeveloped Parcels</b>	<b>Assesed Value</b>	<b>Acreage</b>	
10-30 Rem Carolina	\$ 229,200	1.80	
6R-1 Carolina	\$ 755,900	5.2	
12 Carolina	\$ 336,500	1.6	
6R-2C Carolina	\$ 405,400	2.84	
6R-2B-1 Carolina	\$ 324,200	1.71	
<b>Total</b>	<b>\$ 2,051,200</b>	<b>13.15</b>	<b>\$ 155,985</b>