

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

VIRGIN ISLANDS CONSERVATION SOCIETY, INC.,)	
)	
Petitioner,)	Case No. ST-16-CV-395
)	
v.)	WRIT OF REVIEW
)	
VIRGIN ISLANDS BOARD OF LAND USE APPEALS,)	
)	
Respondent.)	
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)	
MORAVIAN CHURCH CONFERENCE OF THE VIRGIN ISLANDS,)	
)	
Petitioner,)	Case No. ST-16-CV-428
)	
v.)	WRIT OF REVIEW
)	
ST. JOHN COASTAL ZONE MANAGEMENT COMMITTEE AND VIRGIN ISLANDS BOARD OF LAND USE APPEALS,)	
)	
Respondents.)	
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**RESPONDENTS' OPPOSITION TO PETITIONERS' MEMORANDA OF LAW
IN SUPPORT OF THEIR WRITS OF REVIEW**

COMES NOW, the Virgin Islands Board of Land Use Appeals and the St. John Coastal Zone Management Committee, Respondents, by and through their undersigned counsel, hereby submits to this Honorable Court their Opposition to Petitioners' Memoranda of Law in Support of their Writs of Review.

V.I. Conversation Society, Inc. v. V.I. Board of Land Use Appeals
ST-16-CV-395
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I. FACTS AND PROCEDURAL HISTORY

The instant Appeals emanate from the June 6, 2016, Decision and Order rendered by The Board of Land Use Appeals ("BLUA") Following an April 5, 2016, Public Hearing annexed hereto as Exhibit "A." Consistent with its statutory obligations, the BLUA Decision set forth its findings of facts which we incorporate herein by reference and for the court's convenience detail in full below:

- 1) On April 4, 2014, Summer's End Group, LLC ("SEG") submitted to the Division of Coastal Zone Management of the Department of Planning and Natural Resources ("CZM") two (2) Major Coastal Zone Permit Applications for a Marina Project in Coral Bay, St. John; the land and water permits were numbered as Nos. CZJ-03-14(L) and CZJ-04-14(W), respectively (collectively, "the Permits").
- 2) On April 29, 2014, CZM issued a Letter of Incompleteness and Request for More Information to SEG regarding the Permits.
- 3) SEG submitted to CZM the requested information from the Letter of Incompleteness, and on June 18, 2014, CZM sent SEG two (2) letters indicating that both permit applications were complete.
- 4) From July 27, 2014 to August 18, 2014, CZM received comments on the Permits from the League of Women Voters, the Environmental Association of St. Thomas (East), the National Oceanic and Atmosphere Administration, the Virgin Islands Department of Public Works Commissioner Daryl Smalls, the Coral Bay Community

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Counsel, Attorney Maria Hodge, Esq., the U.S. Department of Fish and Wildlife, and counsel for the Moravian Church Conference.

- 5) On August 20, 2014, CZM issued Preliminary Staff Findings regarding the Permits.
- 6) On August 20, 2014, CZM conducted a public hearing regarding the Permits.
- 7) Between August 23, 2014 and August 24, 2014, CZM received comments on the Permits from William McComb, the University of the Virgin Islands, the National Park Service, and David Silverman.
- 8) On September 24, 2014, SEG submitted responsive comments to CZM.
- 9) On October 1, 2014, CZM issued its Final Staff Reports on the Permits.
- 10) On October 1, 2014, CZM held a Decisional Meeting on the Permits.
- 11) CZM issued its Decision Letter to SEG on October 10, 2014, explaining that CZM approved the Permits.
- 12) CZM issued the Permits to SEG on October 24, 2014.
- 13) Between November 14, 2014 and December 5, 2014, Virgin Islands Conservation Society ("VICS"), Moravian Church Conference, T-Rex St. John LLC and Sirius Development LLC (collectively, "Appellants") filed appeals to the BLUA challenging CZM's decision to issue the Permits to SEG.
- 14) The BLUA scheduled a public hearing on this appeal for April 5, 2016.
- 15) However, starting on March 23, 2016, the parties filed numerous motions and briefs raising procedural issues. To start, on March 23, 2016, the VICS filed a Motion to Supplement Appellant's Notice of Appeal.

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16) CZM then filed an Opposition to the VICS' Motion to Supplement on March 31, 2016. That same day, March 31, 2016, SEG filed a Motion to Intervene in the BLUA appeal.

17) On April 1, 2016, SEG filed an Opposition to the VICS' Motion to Supplement. Moravian Church Conference and the VICS each filed an Opposition to SEG's Motion to Intervene on April 1, 2016.

18) SEG filed an amended Motion to Intervene on April 4, 2016. CZM filed a Consolidated Response Brief on April 4, 2016. Moravian Church Conference filed a Motion to Strike Appellee's Brief on April 4, 2016.

19) The BLUA held a public hearing on April 5, 2016.

Following the hearing BLUA issued its findings, taking into consideration the evidence that was considered by CZM at its decisional meeting as outlined in 12 V.I.R.R. § 914-11(a); 12 V.I.R.R. § 914-6. (Exhibit A, ¶ 1-4). In its assessment, BLUA found the land and the water developments mutually dependent and thus ruled that they be treated as one permit application. (Exhibit A, ¶ 14). BLUA therefore Ordered the consolidation of the SEG land and water permits and affirmed the CZM decision approving the SEG applications.

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II. ARGUMENT

In reviewing the actions of CZM and BLUA, the Court must take a two (2) pronged approach. The first to be applied by the Board to the CZM Committee's decision, and the second to be applied by this Court to the Board's action. *V.I. Conservation Soc'y v. V.I. Bd. of Land Use Appeals*, 21 V.I. 516, 1985 U.S. Dist. LEXIS 12142 (D.V.I. 1985).

The standard of review by the BLUA over CZM is identified in 12 V.I.R.R. § 914-3, which provides that:

The Board may review any decision-below in which the findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional, Organic Act of 1954, or statutory provisions;
- (b) in excess of the statutory authority of the Commission, Committee, or Commissioner,
- (c) made upon unlawful procedure,
- (d) affected by other error of law,
- (e) erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary, capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In reviewing a CZM determination under the "substantial evidence" standard, the Board is required to show great deference to the CZM's decision and uphold it if there is substantial evidence in the record to support the actual finding. *Maitland v. Pelican*

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Beach Properties, Inc., 892 F.2d 245, 1989 U.S. App. LEXIS 18520 (3d Cir. V.I. 1989); *Perry v. GESOC*, 18 V.I. 524, 527 (D.V.I. 1981); *Branch v. Bryan*, 18 V.I. 54, 56 (D.V.I. 1980). “Substantial evidence” has been defined as “such evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 [7] 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971). Therefore, the BLUA is required to uphold the CZM determination if there was substantial evidence before the Committee to support its conclusion. Even if there also was substantial evidence to support a different conclusion, BLUA was not free to reverse because it preferred a different conclusion. *V.I. Conservation Soc’y v. V.I. Bd. of Land Use Appeals*, 21 V.I. 516, 1985 U.S. Dist. LEXIS 12142 (D.V.I. 1985).

In reviewing cases from BLUA, this court serves an appellate function. Consequently, the court cannot find facts but rather reviews BLUA determinations to assure that it applied the correct standard. The court also reviews the evidence the CZM had before it to be certain that substantial evidence supported the findings made and conclusions reached by the CZM. *V.I. Conservation Soc’y v. V.I. Bd. of Land Use Appeals*, 21 V.I. 516, 1985 U.S. Dist. LEXIS 12142 (D.V.I. 1985); *Maitland v. Pelican Beach Properties, Inc.*, 892 F.2d 245, 1989 U.S. App. LEXIS 18520 (3d Cir. V.I. 1989).

Appellants and others raised a number of issues below, however, for purposes of this Appeal, the focus is upon BLUA actions concerning subsections (c), (e) and (f) above. In sum, Appellants claim that BLUA failed to apply the correct standard to CZM which they maintain failed to follow proper procedure and came to an erroneous

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conclusion upon granting permits to SEG, in light of all the substantial evidence before it. However, an examination of the record shows that CZM properly weighed the evidence in reaching its conclusion. Appellants' arguments were fully considered by BLUA prior to affirming CZM's actions in the lower proceedings.

A. CZM Considered the Cumulative Impact of the Entire Development as Required by Virgin Islands Law

Appellants maintain that CZM did not consider the cumulative impact of the two permit applications in its review. That requirement is described as "common sense" and also supported by title 12, section 906(a)(1) of the statute. Specifically, 12 V.I.C. 906(a)(1) provides that development policies in the first tier shall guide new development to the maximum extent feasible into locations with, contiguous with, or in close proximity to existing developed sites and into areas with adequate public services and to allow well-planned, self-sufficient development in other suitable areas where it will have no significant adverse effects, individually or cumulative, on coastal zone resources.

An examination of the statute fails to indicate any mandate that land and water permits be combined. Indeed, there is in fact no rule requiring such combined consideration. The decision to do so is purely administrative, as is the converse decision to separate land and water permits. As CZM indicated in their Consolidated Brief to BLUA, incorporated further herein by reference, American Yacht Harbor on St. Thomas has a separate land and water permit, as does Compass Point Marina on St. Thomas. APPX 1877 (Please note that CZM's Consolidated Response Brief is listed in error as

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that of SEG in the Appendix). Having these separate permits provides easier administration and allows for the potential for the permits to be assigned or transferred individually. APPX 1877. Separate permits do not, however, translate to separate consideration. For example, The Port of Mandahl project was submitted as two (2) separate applications. Yet the denial of the water permit was the sole basis for denying the upland development permit. APPX 1878.

Here, CZM did consider the cumulative impact of the proposed construction throughout the entire process. On August 20, 2014, CZM provided its Preliminary Staff Findings on both the Land and Water permit applications. In both "Project Background Description" and "Abstract" sections of these Staff Findings, the construction of the Marina is discussed as one project. Moreover, each Staff Findings refer to the other permit as the "parallel" permit. Therefore, the CZM absolutely considered the cumulative impact of both applications in deciding whether or not to grant the SEG permits.

B. CZM Made the Requisite Findings of Fact In Order For the SEG Permits to Be Issued

Under 12 V.I.C. § 910(a)(2), CZM may grant a permit if:

(2) ... (A) the development is consistent with the basic goals, policies and standards provided in sections 903 and 906 of this chapter; and (B) the development as finally proposed incorporates to the maximum extent feasible mitigation measures to substantially lessen or eliminate any and all adverse environmental impacts of the development; otherwise the permit application shall be denied. The applicant shall have the burden of proof to demonstrate compliance with these requirements; and (C) the applicant has presented certification from the Bureau of Internal Revenue and Department of Finance that the applicant has filed and paid all taxes,

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penalties and interest and from the Office of the Lieutenant Governor that the applicant has filed its required annual report or has satisfactorily made agreement to pay the taxes or file the required reports.

Here CZM issues both Preliminary Staff Findings (APPX 147, 165) and Final Staff Findings (APPX 586, 605) for both the SEG land and water permits along with a detailed Decision Letter. APPX 649. CZM followed mandated procedure and made the proper findings in order to approve the SEG's land and water Permits.

C. SEG Application was Sufficient

Contrary to Appellants' contentions, after some back and forth wherein CZM requested further items from SEG and directed that they respond to community inquiries during the process, SEG's submissions was sufficiently complete upon the final review. Among other things, SEG adequately demonstrated that it holds the legal authority to develop the property upon which the work would be performed. 12 V.I.C. § 910(e)(2) requires proof of legal interest in the property and authority to sign the application. SEG satisfied both requirements through the Power of Attorney granting SEG authority to act on behalf of the owners, through its member/manager Chaliene Summers. APPX 42, 75 and 693. Appellants also list other environmental impact concerns which were discussed at length in the CZM underlying brief demonstrating that CZM fulfilled its statutory requirement albeit likely not in the manner to which Appellants may have liked. APPX 1880-1891.

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D. CZM Commissioner J. Brion Morrisette Properly Participated in the Proceedings for Purposes of a Quorum Only

12 V.I.R.&R. § 904-6 addresses Conflict of Interest. It quite rightly states that the CZM Commissioners and staff work on behalf of the people of the Virgin Islands. It prohibits the consideration or voting by any member who is affiliated with an applicant. Here, as was previously raised below and addressed fully in the CZM Brief, Commissioner Morrisette, properly disclosed his conflict on the record. However, he also had an obligation to appear for the proceedings in order to ensure a quorum thereby enabling the public hearing and decision meeting to move forward. Commissioner Morrisette did not take part in any decision making. Moreover the Commissioner was not mandated to be absent from the proceedings but rather to abstain from influence which he by all accounts did upon disclosure of his relationship to the application. Therefore the Commissioners actions were proper the CZM's decision must stand. APPX 1875-1877.

E. BLUA was within its Authority to Consolidate the SEG Permits and its Findings of Facts Along with its Decision and Order were Legally Sufficient

Where, as here, related controversies involving the same party or parties having substantially identical interests are pending, BLUA may order all controversies consolidated, or may make such other orders concerning the proceedings as may be convenient or may tend to avoid unnecessary costs or delay. 12 V.I.R.&R. § 914-8. In the instant matter, BLUA's administrative decision to formally join SEG's land and water

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applications falls well within its purview. As detailed above both permits were cumulatively considered by CZM, though that agency may have wanted them to remain separate for future assignment or transfer. Nonetheless, BLUA's review of the record before it, detailed factual finding and decision to consolidate fully comports with statute.

III. CONCLUSION

The Virgin Islands Board of Land Use Appeals performed its assessment of the Summer's End Group's land and water permit applications in full accordance with the statute as had the St. John Committee of the Coastal Zone Management Commission before it. Appellants, though clearly disappointed with the result, have provided no basis in law of any violation of the Coastal Zone Management Act and their Petitions must be dismissed in their entirety.

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THEREFORE, for all the foregoing, Respondents the VIRGIN ISLANDS BOARD OF LAND USE APPEALS AND ST. JOHN COASTAL ZONE MANAGEMENT COMMITTEE respectfully pray this Honorable Court issue an order dismissing the Petitions before it.

Respectfully submitted,

CLAUDE E. WALKER, ESQ.
ATTORNEY GENERAL

PAMELA R. TEPPER, ESQ.
SOLICITOR GENERAL

Dated: November 14, 2016

by: 

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2016, a true and correct copy of the foregoing **RESPONDENTS' OPPOSITION** was served via first class mail and electronic mail to:

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A large, stylized handwritten signature in black ink, appearing to read "Boyd L. Sprehn", is written over a horizontal line.

EXHIBIT A

THE VIRGIN ISLANDS BOARD OF LAND USE APPEALS

In the matter of:)	
)	
VIRGIN ISLANDS CONSERVATION)	
SOCIETY,)	
)	
AND MORAVIAN CHURCH CONFERENCE)	
OF THE VIRGIN ISLANDS,)	
)	
AND T-REX ST. JOHN LLC AND SIRIUS)	
DEVELOPMENT, LLC,)	
)	
Appellants,)	Appeal Nos. 005-6/2014; 008/2014
)	
v.)	
)	Permit Nos. CZJ-03-14 (L); CZJ-03-14(W)
ST. JOHN COMMITTEE OF THE VIRGIN)	
ISLANDS COASTAL MANAGEMENT)	
COMMISSION,)	
)	
Appellee.)	
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DECISION AND ORDER

The Virgin Islands Board of Land Use Appeals ("BLUA") by and through its Acting Chairman, Aloy Nielsen hereby renders its Decision and Order in the above-captioned appeal, pursuant to 12 V.I.R.R. § 914-11(a). 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 Virgin Islands Coastal Zone Management Commission ("CZM").

FINDINGS OF FACT

- 1) On April 4, 2014, Summer's End Group, LLC ("SEG") submitted to the Division of Coastal Zone Management of the Department of Planning and Natural Resources ("CZM") two (2) Major Coastal Zone Permit Applications for a Marina Project in Coral Bay, St. John; the land

and water permits were numbered as Nos. CZJ-03-14(L) and CZJ-04-14(W), respectively (collectively, "the Permits").

- 2) On April 29, 2014, CZM issued a Letter of Incompleteness and Request for More Information to SEG regarding the Permits.
- 3) SEG submitted to CZM the requested information from the Letter of Incompleteness, and on June 18, 2014, CZM sent SEG two (2) letters indicating that both permit applications were complete.
- 4) From July 27, 2014 to August 18, 2014, CZM received comments on the Permits from the League of Women Voters, the Environmental Association of St. Thomas (East), the National Oceanic and Atmosphere Administration, the Virgin Islands Department of Public Works Commissioner Daryl Smalls, the Coral Bay Community Counsel, Attorney Maria Hodge, Esq., the U.S. Department of Fish and Wildlife, and counsel for the Moravian Church Conference.
- 5) On August 20, 2014, CZM issued Preliminary Staff Findings regarding the Permits.
- 6) On August 20, 2014, CZM conducted a public hearing regarding the Permits.
- 7) Between August 23, 2014 and August 24, 2014, CZM received comments on the Permits from William McComb, the University of the Virgin Islands, the National Park Service, and David Silverman.
- 8) On September 24, 2014, SEG submitted responsive comments to CZM.
- 9) On October 1, 2014, CZM issued its Final Staff Reports on the Permits.
- 10) On October 1, 2014, CZM held a Decisional Meeting on the Permits.
- 11) CZM issued its Decision Letter to SEG on October 10, 2014, explaining that CZM approved the Permits.

- 12) CZM issued the Permits to SEG on October 24, 2014.
- 13) Between November 14, 2014 and December 5, 2014, Virgin Islands Conservation Society (“VICS”), Moravian Church Conference, T-Rex St. John LLC and Sirius Development LLC (collectively, “Appellants”) filed appeals to the BLUA challenging CZM’s decision to issue the Permits to SEG.
- 14) The BLUA scheduled a public hearing on this appeal for April 5, 2016.
- 15) However, starting on March 23, 2016, the parties filed numerous motions and briefs raising procedural issues. To start, on March 23, 2016, the VICS filed a Motion to Supplement Appellant’s Notice of Appeal.
- 16) CZM then filed an Opposition to the VICS’ Motion to Supplement on March 31, 2016. That same day, March 31, 2016, SEG filed a Motion to Intervene in the BLUA appeal.
- 17) On April 1, 2016, SEG filed an Opposition to the VICS’ Motion to Supplement. Moravian Church Conference and the VICS each filed an Opposition to SEG’s Motion to Intervene on April 1, 2016.
- 18) SEG filed an amended Motion to Intervene on April 4, 2016. CZM filed a Consolidated Response Brief on April 4, 2016. Moravian Church Conference filed a Motion to Strike Appellee’s Brief on April 4, 2016.
- 19) The BLUA held a public hearing on April 5, 2016.

JURISDICTION

- 1) Any aggrieved person may file an appeal of an action by CZM within forty-five (45) days thereof with the BLUA. 12 V.I.C. § 914(a).
- 2) Furthermore, pursuant to 12 V.I.R.R. § 914-3, the BLUA has jurisdiction to review any decision in which the findings, inferences, conclusions, or decisions are: (a) in violation of

constitutional, Revised Organic Act of 1954, or statutory provisions; (b) in excess of the statutory authority of the Commission, Committee, or Commissioner; (c) made upon unlawful procedure; (d) affected by other error of law; (e) erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary, capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

- 3) The Appellants raise numerous challenges to CZM's issuance of the Permits, including subsections (d), (e), and (f) above. Therefore, the BLUA has jurisdiction over this appeal.

CONCLUSIONS OF LAW

- 1) In accordance with 12 V.I.R.R. § 914-11(a), the BLUA's decisions shall be based on the record of the proceedings below.
- 2) The record shall constitute the original papers and exhibits filed in the proceeding-below and the transcript in the proceeding-below. 12 V.I.R.R. § 914-6.
- 3) All of the documents and memoranda that the VICS sought to include in its Supplement to its Notice of Appeal is dated after the decisional meeting of CZM, which occurred on October 1, 2014.
- 4) Therefore, the BLUA denies the VICS' Motion to Supplement filed on March 23, 2016, as the BLUA can only take into consideration and review the evidence that was considered by CZM at its decisional meeting in reviewing this appeal. *See* 12 V.I.R.R. § 914-11(a); 12 V.I.R.R. § 914-6.
- 5) BLUA grants SEG's amended Motion to Intervene, dated April 4, 2016.
- 6) SEG filed its original Motion to Intervene on April 1, 2015, pursuant to 12 V.I.R.R. § 914-17, which states that "[a]ny aggrieved person or applicant may intervene in an appeal by filing a petition with the Board not less than ten (10) days prior to the public hearing."

- 7) As previously stated, SEG filed its original motion on April 1, 2016, therefore it could not be considered an Intervener as the filing was made within ten (10) days of the public hearing.
See 12 V.I.R.R. § 914-17.
- 8) However, in its amended Motion to Intervene, SEG asked to be considered an Amicus Curie party pursuant to 12 V.I.R.R. § 914-9, which states that the BLUA “may, in its discretion, permit an amicus curiae to file briefs or appear on oral argument on such terms and conditions as the [BLUA] determines.”
- 9) Since there is no time restriction to filing an amicus curiae brief, the BLUA grants SEG’s April 4, 2016 Motion to Intervene, allowing SEG to participate in the appeal as an amicus curiae party.
- 10) The BLUA affirms CZM’s decision to issue the Permits to SEG.
- 11) The BLUA concurs with CZM that findings were made by CZM in a legally sufficient manner. The Final Staff Recommendations by CZM were issued for each permit—land and water—on October 4, 2014, containing the legally sufficient findings.
- 12) Furthermore, the BLUA is unpersuaded by Appellant’s arguments as to how these findings are inconsistent with the goals and policies articulated in 12 V.I.C. § 903, or the procedures of 12 V.I.C. §§ 910(a)(2) and 911(c).
- 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 upon the other. Because the land

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and the water permit applications are for mutually dependent developments, they must be treated as one permit application.

- 15) The BLUA notes that both the Land and Water Permits have a condition that reads: "Prior to the start of work, [SEG] shall submit to CZM a performance bond in the amount of 20 percent, up to \$5M, of the estimated construction cost of the development."
- 16) Because the BLUA finds that the permits are to be consolidated, the BLUA notes that this now requires that SEG, prior to the start of construction, submit to CZM a performance bond in the amount of 20 percent, up to \$10 million, of the estimated construction cost of the development.

ORDER

IT IS HEREBY ORDERED that the Motion to Supplement Appellant's Notice of Appeal filed by the VICS is DENIED; and it is further


ORDERED that SEG's amended Motion to Intervene as an amicus curie party is GRANTED; and it is further

ORDERED that the Permits at issue, Nos. CZJ-03-14(L) and CZJ-04-14(W), be consolidated; and it is further

ORDERED that the St. John Committee of the Virgin Islands Coastal Zone Management Commission approval and issuance of the Permits Nos. CZJ-03-14(L) and CZJ-04-14(W) is AFFIRMED.

Ordered This 6 Day of JUNE 2016.

BY THE VIRGIN ISLANDS BOARD OF LAND USE APPEALS


Aloy Nielsen, Acting Chairman