SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS & ST. JOHN

VIRGIN ISLANDS CONSERVATION SOCIETY, INC., PETITIONER, V. VIRGIN ISLANDS BOARD OF LAND USE APPEALS, RESPONDENT	**ST-16-CV-_____** **PETITION FOR WRIT OF REVIEW**

PETITION FOR WRIT OF REVIEW

Now comes the Virgin Islands Conservation Society, Inc., through undersigned counsel, and petitions this Court for a review of the written decision of the Board of Land Use Appeals dated June 6, 2016 in Board of Land Use Appeal Nos. 005-6/2014 and 008/2014.

1. This is a petition for review of a decision of the Virgin Islands Board of Land Use Appeals which consolidated Coastal Zone Management Permit CZJ-03-14(L) and CZJ-03-14(W) and then affirmed the decision of the St. John Committee of the Virgin Islands Coastal Zone Commission to issue both permits.
2. On or about April 4, 2014, Summer's End Group, LLC ("SEG") submitted two separate applications for the development of a marina complex in Coral Bay, St. John.
3. One of the two applications was for the development of the "land-side" aspects of

the marina complex. This application sought approval to construct 120 off-street parking spaces, a new 56 seat restaurant, a Customs and Border Protection office, A marina office, a marina engineering facility, a marina security office, a Fish and Farmers Market, a crew shower and locker facilities, apartments to support marina management, a sewage treatment system, and fuel facilities for the boats in the marina and other boaters. Phase 2 of the development (which was included as a part of the Land Permit application and authorized by the issuance of the Land Permit) will include: additional retail, restaurant, office and commercial spaces and six short-term rental units. This application was assigned the designation CZJ-03-14(L) by the Coastal Zone Management staff within the Virgin Islands Department of Planning and Natural Resources ("DPNR-CZM").

4. The second application was for the "water-side" of the same marina complex. This application sought approval to construct a 145-slip fixed-dock marina with twelve permanent moorings, a sewage pump-out station and a fuel station, along with a mooring field for 75 boats in the western portion of Coral Harbor located within Coral Bay, St. John. The application also sought approval to use and occupy 27.5 acres of submerged lands. This application was assigned the designation CZJ-04-14(W) by DPNR-CZM.
5. On June 18, 2014, DPNR-CZM deemed both applications complete.
6. On August 20, 2014, the St. John CZM Committee ("CZM-STJ") conducted a public hearing on both applications. An overflow crowd of St. John residents attended

with the overwhelming majority of same coming out in opposition to the two applications. Despite an admitted conflict of interest, Commissioner Brion Morrisette participated in the meeting for the purposes of establishing the quorum of three commissioners required by Virgin Islands law.

7. A duly-authorized representative of VICS testified at the August 20, 2014 hearing and gave reasons as to why both the Land Permit and the Water Permit should be denied. VICS also submitted written comments detailing why both the Land Permit and the Water Permit should be denied. VICS is therefore an "aggrieved person" as defined by 12 V.I.C. § 902(a).

8. On October 1, 2014, CZM-STJ held a decisional meeting on the two applications. Only three commissioners were present for the meeting. Despite the conflict of interest, Commissioner Brion Morrisette again participated in the meeting for the purposes of establishing the quorum of three commissioners required by Virgin Islands law. Acknowledging his conflict of interest, Commissioner Morrisette abstained from voting on the applications. The applications were approved by a 2-0 vote. Exhibit 1 is a copy of the transcript of the decisional meeting.

9. CZM-STJ issued written Major CZM Permits CZJ-03-14(L) ("the Land Permit") (Exhibit 2) and CZJ-04-14(W) ("the Water Permit") (Exhibit 3) on October 24, 2014.

10. VICS filed timely appeals of the above mentioned permits with the Board of Land Use Appeals on November 14, 2014.

11. The Virgin Islands Board of Land Use Appeals ("VIBLUA") held a public hearing on VICS's appeal (as well as on related appeals filed by other parties) on April 5, 2016.

12. At the conclusion of the April 5, 2016 hearing, VIBLUA voted to consolidate the Land Permit and the Water Permit and then "affirmed" the decision of CZM-STJ.

13. On June 6, 2016, VIBLUA issued its written decision on the Land Permit and Water Permit without stating "in writing and in detail the reasons for its decision and [the] findings of fact upon which its decision [was] based." 12 V.I.C. § 914(d). A copy of the decision is attached as Exhibit 4.

I. CZM-STJ FAILED TO CONSIDER THE CUMULATIVE IMPACT OF DEVELOPMENT AS REQUIRED BY 12 V.I.C. § 903.

14. A development policy within the first tier of the Virgin Islands Coastal Zone is to guide new development "where it will have no significant adverse effects, individually *or cumulative*, on coastal zone resources." 12 V.I.C. § 906(a)(1). (Emphasis added.)

15. Further, 12 V.I.C. § 903(b)(4), requires a CZM Committee to assure the orderly, balanced utilization and conservation of the resources of the coastal zone.

16. Consequently, a CZM Committee must consider not just the individual impact of a proposed development but must also consider the cumulative impact due to other existing or proposed development.

17. It is error for a CZM Committee to grant a permit "without considering the impact of the fully built development" because to do so "would constitute a violation of the

VICZMA and a travesty of the administrative controls entrusted to the . . . Committee." *Grapetree Area Property Owner's Assoc., Inc. v. St. Croix Committee of the Virgin Islands Coastal Zone Management Commission*, App. No. 94/007 (VIBLUA March 30 1995) at p.11 (a copy of this decision is attached as Exhibit 5). For this reason, the "Environmental Assessment Report ("EAR") submitted as part of a CZM Permit application must include "detailed information . . . about the effects which a proposed development is likely to have on the environment." 12 V.I.C. § 902(o).

18. CZM-STJ allowed SEG to submit separate applications for its marina proposal: One application dealt with the land-side of the marina proposal. The second application dealt with the water-side of the same marina proposal.

19. Rather than consider the applications as a single application and consider the overall impact of development, CZM-STJ considered each application separately and failed to consider the overall impact of development.

20. The EAR submitted in support of the application for the Land Permit states in Section 9, "this project is entirely dependent on the adjacent marina project."

21. The water-based marina has limited infrastructure (other than the docks and moorings). It relies solely upon management and marina support offices, emergency generators, restrooms, locker rooms, fuel storage, potable water supply, marine sewage holding tanks and parking that is provided by the development authorized under the Land Permit. Without the Water Permit, much of the

land-based development is unnecessary; and, without the Land Permit, the marina cannot function. At the CZM Public Hearing, SEG referred to the combined land and water developments as "the project" at least ten times, for example "I'm going to backtrack just a little bit to talk about how the project, which you'll see tonight, came to be" and "I will now turn it over to Mr. Jeff Boyd, who will begin to talk about some of the technical aspects of the project" and in fact never once referred to the activity as two projects.

22. Although SEG isolated the environmental *impacts* of the two halves of the marina project (in order to minimize the apparent and cumulative impact), it nevertheless combined the economic *benefits* of the two halves of the marina project in the individual EARs so that the cumulative *benefits* supported each half of the project. Consequently, the EARs presented a skewed picture of the adverse impacts and benefits that precluded CZM-STJ from properly weighing the benefits and adverse impacts of the proposal.

A. THE WHOLE IS GREATER THAN THE SUM

23. The total impact of two projects in combination can be greater than the sum of the impacts from two projects when considered in isolation. For example, if land-based and water-based construction are occurring at the same time, the impact of erosion, run-off, and sedimentation can be greater than if each project is developed at separate times. Run-off from land-based construction activities could potentially overwhelm the turbidity screens used to control the migration of sediment from the

marine-based construction.

B. WATER PERMITS ARE SUBJECT TO GREATER SCRUTINY; SEPARATING THE TWO APPLICATIONS ALLOWED THE LAND ACTIVITIES ASSOCIATED WITH THE SUBMERGED LAND OCCUPANCY TO ESCAPE THAT SCRUTINY.

24. Additionally, by separating the two permits, SEG was able to reduce the level of scrutiny applied to its land-based activities.

25. For example, before a CZM Committee may issue a submerged land (a.k.a. "water") permit, it must make a specific finding that there will be compliance with the Territory's air and water quality standards. 12 V.I.C. § 911(c)(5).

26. The land-based development will require the disturbance of four acres of land with the resulting potential for the creation of dust and the release of emissions from construction equipment and generators. In addition to affecting air quality, these emissions can affect water quality as they land on the water.

27. These emissions, when quantified, can also be mitigated.

28. Because these emissions were not considered as part of a single, combined land and water permit application, they were not subjected to the scrutiny required under 12 V.I.C. § 911(c)(5).

29. As another example, the fuel storage tanks, the sewage holding tanks, and the construction which traverses the sole access road to communities south of the project (Federal Highway 107) all present impacts to public health, safety and general welfare. Because these project components were addressed in the application for the Land Permit, they escaped the "public interest" scrutiny of

911(c)(2).

C. THE CZMA REQUIRES THAT THE CZM COMMITTEE CONSIDER THE CUMULATIVE IMPACT OF ALL PROPOSED DEVELOPMENT UPON THE COASTAL ZONE.

30. CZM-STJ also failed to consider the cumulative impacts of other development in the area, including the Moravian Church's proposed marina.

31. The possibility of a second marina in Coral Bay would have a cumulative adverse impact on the environment; further, the existence of a competing marina could adversely impact the economic viability of SEG's proposal.

32. CZM-STJ erred when it failed to consider the cumulative impacts of SEG's activities and when it failed to consider the overall cumulative impact of development in Coral Bay. Those errors require that both the Land Permit and the Water Permit be vacated.

II. VIBLUA LACKED THE AUTHORITY TO CONSOLIDATE THE TWO PERMITS.

33. VICS and other aggrieved parties objected to CZM-STJ's failure to consider the cumulative impacts of development, both at the CZM level and then on appeal to VIBLUA.

34. VIBLUA agreed that each permit application was dependent upon the other and determined that "they must be treated as one permit application." Exhibit 4, Conclusion of Law No.14.

35. While this conclusion by VIBLUA was undoubtedly correct, it erred because it failed to recognize that CZM-STJ's failure to treat the permits as one application

correlated with CZM-STJ failure to assess the cumulative effects of the development.

36. Rather than reverse the issuance of the two permits, VIBLUA simply ordered that they be consolidated.

37. VIBLUA's decision did not address CZM-STJ's error in failing to consider the cumulative impact of development.

38. VIBLUA's decision to consolidate the two permits was *ultra vires*, as its appellate authority is limited to "either approv[ing] or deny[ing] an application for a coastal zone permit." 12 V.I.C. § 914(d).

III. CZM-STJ FAILED TO MAKE THE FINDINGS OF FACT THAT MUST BE MADE BEFORE A PERMIT MAY BE ISSUED.

39. The CZMA requires each committee to make a determination that the proposed activity is consistent with the goals, policies and standards of the CZMA, including the environmental policies set forth in 12 V.I.C. § 906(b) and § 911(c).

40. The CZMA mandates that if the project is not consistent with any of the goals, policies or standards of the CZMA, a permit must be denied. See 12 V.I.C. § 910(a)(2) and § 911(c).

41. The *conclusions* that *must* be made for *all* permits, as required by 12 V.I.C. § 910(a)(2) are:

    a. that the development is consistent with the basic goals, policies and standards provided in 12 V.I.C. §§ 903 and 906; and

    b. that 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.

42. Additionally, with respect to the Water Permit, CZM-STJ was required by 12 V.I.C. § 911(c) to make the following *conclusions*:

a. that the grant of a submerged lands permit will clearly serve the public good, will be in the public interest and will not adversely affect the public health, safety and general welfare or cause significant adverse environmental effects;

b. that the occupancy and/or development to be authorized by such a permit will enhance the existing environment or will result in minimum damage to the existing environment;

c. that there is no reasonably feasible alternative to the contemplated use or activity which would reduce the adverse environmental impact upon the trust lands or other submerged or filled lands;

d. that there will be compliance with the United States Virgin Islands territorial air and water quality standards;

e. that the occupancy and/or development will be adequately supervised and controlled to prevent adverse environmental effects; and

f. that in the case of the grant of an occupancy or development lease, an occupancy or development permit for the filled land is not sufficient or appropriate to meet the needs of the applicant for such lease.

43. CZM-STJ adopted the conclusions of the CZM Staff with respect to the conclusions

required by 12 V.I.C. § 910(a)(2) and 12 V.I.C. § 911(c)(1) and (2). However, it did not make *any* of the conclusions required by 12 V.I.C. § 911(c)(3) through (7). For this reason alone, the Water Permit must be vacated (and because the Land Permit application should have been consolidated with the Water Permit application before it was considered, it too must be vacated).

44. Further, even with respect to the *conclusions* reached by CZM Staff and adopted by CZM-STJ, the Committee made *no factual findings* such that VIBLUA or this Court could properly review those conclusions. Neither CZM Staff nor CZM-STJ offered any analysis of the criticisms of the proposed development that were offered by federal agencies, non-profit organizations and individual members of the public. Neither CZM Staff nor CZM-STJ articulated any reason for adopting, essentially verbatim, sections of the EARs even when those sections were the subject of considerable criticism by reputable sources.

45. "One of the most significant aspects of any administrative agency's decision are the findings of facts." *Virgin Islands Conservation Society, Inc. v. V.I. Board of Land Use Appeals*, 49 V.I. 581, 598 (D.V.I. 2007) (citing *Envtl. Ass'n v. V.I. Bd. of Land Use Appeals*, 31 V.I. 9, 12-16 (Terr. Ct. 1994). "The findings of fact should be sufficient in content to apprise the parties and the reviewing court of the factual basis for the action taken so that the parties and the reviewing tribunal may determine whether the decision has support in evidence and in law." 49 V.I. at 598.

46. CZM-STJ failed to make any findings of fact.

47. CZM-STJ's failure to make findings of fact requires that its decision be reversed.

48. Ironically, VIBLUA's findings of "fact" in the appeal of this matter are limited to a recitation of facts relating to the procedural history of the permit applications. In Conclusion of Law No. 11, however, VIBLUA concluded that the Final Staff Recommendations of CZM staff "contain[ed] the legally sufficient findings." However, it is CZM-STJ that statutorily must make the findings of fact. Staff is limited to making recommendations.

49. CZM-STJ's failure to make the required findings of fact requires the reversal of the permit; VIBLUA's conclusion that the findings of fact were sufficient is an error of law that requires reversal of that decision.

IV. THE CZM APPLICATION SUBMITTED BY SEG WAS INSUFFICIENT AS A MATTER OF LAW

A. SEG FAILED TO ESTABLISH THAT IT HAD THE LEGAL INTEREST TO DEVELOP THE PROPERTY IN ACCORDANCE WITH ITS PROPOSAL.

50. An application for a major coastal zone management permit must include proof of legal interest in the property. 12 V.I.C. § 910(e)(2).

51. Further, the applicant must prove that it has the right to perform development upon all of the property upon which work would be performed if the application were approved. 12 V.I.R.&R. § 910-3(b).

52. If an applicant is not the owner of the property to be developed, then the owner must co-sign the application. V.I.R.&R. § 910-3(b).

53. The "Proof of Legal Interest" form prepared by CZM and required of all applicants for a CZM Permit requires the applicant to swear under oath that "I have the irrevocable approvals, permission or power of attorney from all other persons with a legal interest in the property to undertake the work proposed in the permit application . . . ." (*See* Form L&WD-5.)

54. The Land Permit authorizes SEG to develop Parcel Nos. 10-17, 10-18, 10-19, 10-41 Rem, 13A, l3B and 13 Rem, all of Estate Carolina.

1. PARCELS 10-17 AND 10-18 ESTATE CAROLINA

55. As part of its application for the Land Permit, SEG submitted deeds for Parcel Nos. 10-17 and 10-18, which established that the owners of those parcels were Eglah March Clendenin and Minerva Marsh Vasquez, at Trustees of the Marsh Sisters Trust.

a. Neither of the Trustee-owners co-signed the application for the Land Permit.

56. SEG also submitted a copy of a lease of Parcels 10-17 and 10-18 from the Trustee-owners to Brion Morrisette and Robert O'Connor, Jr.

a. Neither Morrisette nor O'Connor signed the application for the Land Permit.

57. SEG's sole evidence that *it*, the applicant, had any legal right relating to Parcels 10-17 and 10-18 consisted of a limited power of attorney Morrisette and O'Connor that was "for the sole and limited purpose of providing [SEG] the legal authority to apply for" the CZM permit.

58. The limited power of attorney was revocable and expired on January 1, 2015 or

upon revocation, whichever first occurred.

59. SEG submitted no evidence establishing that it has the legal right to *develop* the Parcels 10-17 or 10-18.

60. No one with legal authority to develop the property signed the CZM permit.

2. PARCELS 10-19 AND 10-41 REM

61. As part of its application for the Land Permit, SEG submitted deeds for Parcel Nos. 10-19 and 10-41 Rem, which established that the owner of those parcels was Calvert Marsh, Inc.

    a. No one acting on behalf of Calvert Marsh, Inc. signed the application for the Land Permit.

62. SEG also submitted a copy of a lease of Parcels 10-19 and 10-41 Rem from Calvert Marsh, Inc. to Brion Morrisette and Robert O'Connor, Jr.

    a. Neither Morrisette nor O'Connor signed the application for the Land Permit.

63. SEG's sole evidence that *it*, the applicant, had any legal right relating to Parcels 10-19 and 10-41 Rem consisted of a limited power of attorney from Morrisette and O'Connor that was "for the sole and limited purpose of providing [SEG] the legal authority to apply for" the CZM permit.

64. The limited power of attorney was revocable and expired on January 1, 2015 or upon revocation, whichever first occurred.

65. SEG submitted no evidence establishing that it has the legal right to *develop* Parcels 10-19 or 10-41 Rem.

3. PARCEL 13 REM

66. As part of its application for the Land Permit, SEG submitted a copy of the deed for Parcel 13 Rem, Estate Carolina, which established that the owners of the parcel were Jim Phillips and Genoveva Rodriguez.

    a. Neither Phillips nor Rodriguez signed the application for the Land Permit.

67. SEG's sole evidence that *it*, the applicant, had any legal right relating to Parcel 13 Rem consisted of a limited power of attorney from Phillips and Rodriguez that was "for the sole and limited purpose of providing [SEG] the legal authority to apply for" the CZM permit.

68. The limited power of attorney was revocable and expired on January 1, 2015 or upon revocation, whichever first occurred.

69. SEG submitted no evidence establishing that it has the legal right to *develop* Parcel 13 Rem.

4. PARCELS 13A AND 13B

70. As part of its application for the Land Permit, SEG submitted an Order Confirming the Marshal's Sale of parcels 13A and 13B Estate Carolina to Merchants Commercial Bank.

    a. The Order Confirming the Marshal's Sale was subject to the owner's right of redemption.

71. No Marshal's Deed transferring the parcels to Merchants Commercial Bank was included in the record before the CZM-STJ.

72. It is a matter of public record that Merchants Commercial Bank assigned its certificate of sale for Parcel 13A to 13A Estate Carolina, LLC on June 23, 2014. The assignment is recorded in the St. Thomas/St. John Office of the Recorder of Deeds as document no. 2014005850. VICS requests that this Court take judicial notice of the assignment. A true copy of the assignment is attached as Exhibit 6.

73. No one acting on behalf of the Superior Court Marshal, Merchants Commercial Bank or 13A Estate Carolina, LLC signed the application for the Land Permit.

    a. SEG submitted no evidence establishing that it has the legal right to develop Parcels 13A or 13B.

74. SEG's sole evidence that *it*, the applicant, had any legal right relating to Parcels 13A and 13B consisted of a limited power of attorney from Merchant's Commercial Bank that was "for the sole and limited purpose of providing [SEG] the legal authority to apply for" the CZM permit.

    a. Merchant Commercial Bank's assignment of the certificate of sale to 13A Estate Carolina, LLC, revoked, as a matter of law, the limited power of attorney the bank had granted to SEG with respect to Parcel 13A.

75. The SEG application for the land-based development clearly did not contain proof of legal interest, the requisite signatures of the owners of the properties, or evidence that the applicant had the power to develop the properties. For this reason, the application failed to comply with 12 V.I.R.&R. § 910-7(a)(3) and should not have been deemed complete.

76. The determination that the application was complete was arbitrary and capricious. *See Grapetree Bay Homeowner's Ass'n* (Exhibit 5), p.20 (CZM Committee's failure to follow its own regulations "constitutes an arbitrary and capricious act").

77. The Land Permit was issued to SEG; it was not issued to the individuals or entities that had granted the limited powers of attorney to SEG.

78. The decision to grant the Land Permit to SEG when it did not submit proof that it had the legal authority to develop the property was also arbitrary and capricious.

B. SEG'S ENVIRONMENTAL ASSESSMENT REPORTS FAILED TO MEET THE LEGAL REQUIREMENTS OF THE CZM ACT.

79. An application for a major coastal zone management permit must include a completed environmental assessment report as defined in 12 V.I.C. § 902(o) and appropriate supplementary data reasonably required to describe and evaluate the proposed development and to determine whether the proposed development complies with statutory criteria under which it might be approved. 12 V.I.C. § 910(e)(2).

80. Pursuant to 12 V.I.C. § 902(o), the "Environmental Assessment Report" is an "informational report prepared by the permittee available to public agencies and the public in general"

81. Pursuant to 12 V.I.C. § 902(o) the Environmental Assessment Report "shall include detailed information about the existing environment in the area of a proposed development, and about the effects which a proposed development is

likely to have on the environment; an analysis and description of ways in which the significant adverse effects of such development might be mitigated and minimized; and an identification and analysis of reasonable alternatives to such development."

82. The Environmental Assessment Reports submitted by SEG failed to meet the above requirements of the CZMA for numerous reasons, including, *inter alia*, (and without limitation) the following:

    a. Failure to address the cumulative impact of development (discussed above).

    b. Failure to properly address the sewage treatment requirements of the overall marina proposal. The EAR supporting the application for the Land Permit describes sewage treatment solely for the land based aspect of the proposal. (It states that only 10.830 gallons/day of sewage (from toilets, sinks, etc.) will be generated from the sewage treatment facility – such a small amount of wastewater could not possibly include wastewater from the boats using the proposed marina; nor could it include the "crew showers" based on shore.) The EAR supporting the application for the Water Permit relies upon a holding tank to be constructed under the auspices of the Land Permit and simply states that sewage/wastewater pumped (from boats) into the holding tank will be trucked from Coral Bay to Cruz Bay. There is no assessment of the impact of this additional wastewater upon the Virgin Islands Waste Management Authority. Critically, SEG utterly failed to address the problems associated

with boats that might use its facility and improperly discharge wastewater into Coral Bay. Other problems with the assessment of the sewage treatment issues included:

i. little detail was provided regarding the location, management and stability of the pump-out storage facility;

ii. no plans or mitigation measures were considered to substantially lessens or eliminate the adverse impacts of a spill from the pump-out facility;

iii. there was no discussion of the tank design and how spills would be contained;

iv. there was no management plan for depositing and removing sewage from the storage tank.

c. Failure to provide adequate information such that the project's impact upon water quality could be properly addressed. Specifically, the EAR for the Land Permit application[1] should have provided, at a minimum, the following:

i. How the use of sewage treatment grey water for irrigation (the entire land-based portion of the marina is in close proximity to the shore and a gut that runs between Parcels 13A and 12B and Coral Harbor) would affect water quality;

ii. How the discharge of grey water (in excess of the capacity needed for

[1] For convenience, criticisms are directed to the EARs as submitted. By doing so, VICS is in no way conceding that the submission of separate EARs for the land and water aspects of the marina proposal was appropriate.

irrigation) into the marina project's drain fields would affect water quality;

iii. the location of the drain fields (how can the environmental impact be ascertained when the location of the drain fields is not identified?);

iv. the design of the drain fields;

v. adequate information about the erosion and sedimentation controls that were to be used during construction

d. Failure to adequately describe the construction methods proposed and provide a schedule for construction activities (Land Permit EAR).

e. Failure to include a plan for implementation of, and maintenance of, sediment and run-off control devices (Land Permit EAR).

f. Failure to include adequate information regarding the required analysis of alternatives to the proposed development (both EARs).

g. Failure to include a plan to address emissions of particulate matter and other air pollutants (both EARs).

h. Failure to provide sufficient water quality data to establish the existing water quality and then assess the impact that both construction and operation of the marina development would have upon the water quality. Such an analysis is required by CZM's own Supplemental EAR Guidelines for Marina Development.

i. Failure to include requisite information regarding the methodology to be used

for water quality monitoring and modeling (also required by CZM's own Supplemental EAR Guidelines for Marina Development).

j. Submission of inaccurate, incomplete, and outdated water sampling data with no evidence to establish that the water samples were representative of the project site (in particular, the use of water samples that were taken prior to the completion in 2012 of significant measures taken by the nonprofit agencies with the cooperation of the U.S. Virgin Islands government to control storm water sedimentation reaching Coral Harbor. In other words, after 2012, water quality in Coral Harbor should be significantly better than it was prior to 2012. By using samples taken prior to 2012, SEG presented an inaccurate picture of the baseline water quality. This would mean that as water samples were taken during construction to assess the impact of construction and compared to samples prior to 2012, the use of the older samples would make it appear that the construction activities were having a lesser impact upon construction than they actually were.

k. Failure to provide reliable wave studies so that CZM could assess the adequacy of measures taken to prevent damage to boats and the environment; or to assess whether SEG's economic projections relating to the usage of its proposed marina (relevant to the issue of alternatives to the proposed development) were realistic. Many people providing testimony at the CZM hearing raised questions as the viability of the marina and the quality of the

yachting experience in the marina given its exposure to waves.

l. Failure to address the impact that the increased marine traffic (to the marina) would have on the limited safe hurricane harbors in the Virgin Islands.

m. Failure to address contingency plans relating to hurricane damage to the fueling facilities and fuel spills at any time reaching the nearby shoreline mangroves.

n. Failure to address the ability of the proposed docks to withstand typical conditions anticipated in a hurricane (and thereby to potentially contribute to significant marine debris creating a hazard to boaters and the adjacent protected mangroves).

o. The use of irrelevant factors, such as data regarding swells, to conclude that the fetch in Coral Bay is insufficient to allow the creation of large wind waves.[2]

p. Failure to propose feasible or adequate mitigation measures. Specifically, but without limitation:

    i. There was insufficient information provided from which CZM could have concluded that the proposed transplantation of seagrass was feasible: there was no evidence that the proposed transplant location was suitable;

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[2] Fetch refers to the amount of open water over which wind must blow in order to build wind waves of various sizes. Although wind waves can contribute to swell, the opposite is not true – swell plays no part in the creation of wind waves. Thus, data regarding swells is irrelevant to the determination of fetch and/or the size of wind waves.

nor were criteria established by which success of the mitigation effort could be considered; no consideration was given to the littoral rights of landowners adjacent to the planned transplant location (*e.g.*, whether they would be deprived of the right to seek to develop the submerged lands adjacent to their properties or, alternatively, whether if they were permitted to use such rights, how they would be burdened by having to deal with relocating the transplanted seagrasses).

ii. The proposed location for transplanting the seagrasses was an area where seagrasses have previously been destroyed by high sedimentation; SEG failed to produce evidence that the same result would not occur with the transplanted seagrasses.

iii. SEG's proposed transplant area covered approximately 0.06 acres whereas the impacted area consisted of eight acres of direct impact (within the project footprint) plus an additional approximately twenty acres that would sustain indirect impact from the project.

q. Failure to provide any information regarding the turbidity controls (turbidity curtains) so that CZM-STJ could assess whether or not the turbidity controls were sufficient and would properly control the migration of suspended particles. These deficiencies included, without limitation:

i. providing no information about the placement or depth of the turbidity curtains;

ii. no addressing how construction vessels and barges could enter and exit the construction site without causing a release of suspended particles beyond the curtains;

iii. establishing that the turbidity curtains were practical for the actual wave activity anticipated at the site;

r. Failure to provide any information as to the impact of the turbidity controls upon marine life and measures that would be taken to protect marine life from the turbidity controls.

s. Failure to consider mitigation of construction impacts. The dock construction will result in damage due to barge spuds and tugboat propeller wash. SEG proposed no mitigation measure and instead improperly delegated responsibility for controlling this damage to unknown contractors. SEG stated that these contractors would be provided with a "construction management plan." No such construction management plan was included in the application and thus CZM could not review it.

t. Failure to provide adequate information about the proposed mooring field for 75 boats. SEG proposed the use of a 75 boat mooring field to mitigate the impact of its displacement of 115 existing boats currently on moorings in Coral Bay. It offered no information from which CZM could determine how the existing mooring users would be incentivized to use the new moorings. SEG indicated that it would have a memorandum of understanding with DPNR to

manage the mooring field. The memorandum of understanding was not submitted as part of the application process. There is no evidence that the proposed mooring field would comply with the Mooring and Anchoring Act, 25 V.I.C. §§ 401, *et seq*. (which, among other things, requires community participation in the development of mooring fields). There was no information provided to properly delineate the location, size or design of the mooring area such that CZM could possibly consider its impact upon the environment.

u. The proposed "out-of-kind" mitigation through the planting of mangroves was insufficiently described. No adequate plan was provided of this proposed mitigation measure.

v. Failure to properly eliminate, or address, impacts upon endangered species. SEG admitted in its EAR that the seagrass beds in Coral Bay were "forage habitat for endangered sea turtle species." Water EAR at 5-2. SEG also acknowledged that its project would "impact seagrass beds" which are "considered a critical foraging habitat for sea turtles. *Id.* at 6-39. SEG also admitted that construction activity had the potential to impact endangered coral species "due to water quality impacts and due to vessel strikes." *Id.* at 6-40. Despite these admissions, SEG offered no substantive solutions to eliminate or minimize such impacts.

w. Failure to address the potential for impact upon significant areas of marine resources adjacent to Coral Harbor, including Hurricane Hole, the Virgin

Islands National Park, the Virgin Islands Coral Reef National Monument, as well as Lagoon Point National Natural Landmark. 12 V.I.C. § 911(b)(1)(A) requires an EAR that adequately states the prevailing conditions of the site as well as adjacent properties.

x. Failure to comply with the Supplemental EAR Guidelines for Marina Development which includes management measures that "must" be addressed in an EAR as well as "recommended measures" that can be used to implement the required management measures.

y. Failure to address the impacts of destruction of spawning and feeding habitat on the fish population. The application did not contain a survey of fish habitat to determine the variety of fish species that use the habitat. There was insufficient information as to the impact upon the fishing community due to the destruction of critical habitat.

z. Failure to address the reduced shoreline/boating access for the fishermen who currently use the project shoreline as their access to the water. There is no provision for mooring/docking their fishing boats in SEG's plans, despite their current active presence on the subject property and shoreline.

aa. SEG's analysis of the economic impact of the proposed marina lacked detail or support for its rosy economic projections. Among other deficiencies, SEG only included positive economic impacts while pretending that negative economic impacts did not exist.

bb. SEG stated in its water EAR that "conditions permitting, piles are anticipated to be driven with a vibratory hammer and local geological conditions are not expected to adversely impact this plan." Water EAR at 6-13. SEG plans to drive 1,333 piles. *Id*. at 6-16. No information was provided as to how deep these piles would have to be driven in order to properly anchor the docks. No information was provided as to the geology of the seabed so that it could be determined whether the use of piles is appropriate or whether vibratory pile driving would be successful.

cc. The EAR also lacked sufficient information regarding the sonic impact of the pile driving upon endangered species or steps that would be taken to minimize such impacts.

V. THE WATER PERMIT FAILS TO SET FORTH THE BASIS FOR THE RENTAL FEES.

83. The computation of rental fees for all permits for development of the submerged lands, rental reductions and waivers are all determined by 12 V.I.C. § 911(f) and 12 V.I.R.&R. § 910- 5(e). These provisions require, among other things, that the basis for negotiation of the rental fees be attached to the lease or permit and that it be based on the fair market value, gross receipts of the commercial operations, and any other factors that may be pertinent. If the fees are to be waived or reduced, it must be determined to be in the public interest. In addition, the determination must be in writing specifying the reasons for it. A copy must be attached to the permit and transmitted to the Governor for approval, and to the

Legislature for ratification.

84. The basis for the calculation of the rental fees was not included as part of the Water Permit.

85. Without the required document, there is no way to know the basis of CZM's calculation. Consequently, it is impossible to determine how the rent was calculated or whether it considered all of the submerged lands that are subject occupancy by SEG (including the mooring field and transplant areas).

86. To the extent that the calculated fee reflects a reduction or waiver of the rent that is required, the term for reconsideration or reassessment of the rental fees cannot exceed 3 years. In this case, the Permit provides a term of 5 years.

VI. THE WATER PERMIT WAS SUBJECT TO IMPROPER CONDITIONS.

87. 12 V.I.R.&R. § 910-11(b) and (c) prohibits the issuance of a CZM permit when conditions of the permit have not yet been met.

88. 12 V.I.C. § 904(d) vests the CZM Commission with "primary responsibility for the implementation of the provisions of" the CZM Act.

89. The Respondent has illegally attempted to usurp this authority by issuing a permit that bypasses the CZM Committee and attempts to give SEG or other unknown parties the primary responsibility for implementation of the provisions of the CZM Act that apply to the permit conditions.

90. CZM-STJ included a condition in the Water Permit that the turbidity curtains needed to be installed at an "adequate depth" in order to prevent suspended

sediments from migrating outside the work area. In setting this condition, the Committee implied the information was necessary, but was not submitted to the Committee beforehand for review and assumed that there was an adequate depth at which the curtains will perform properly.

91. Such belated conditions are specifically prohibited by the CZMA, *See Virgin Islands Conservation Society v. Virgin Islands Port Authority*. 21 V.1. 584 (Terr. Ct. St. T. and St. J. 1985); *Virgin Islands Conservation Society v. Virgin Islands Board of Land Use Appeals*, 857 F. Supp. 1112, l 120 (D. V.I. 1994) ("deferring the review of plans and studies until after a permit is issued creates twin evils: the tendency to tolerate more environmental harm once development has begun, and the incentive for applicants to present the CZM Committee with a fait accompli by delaying the submission of the requested information") and violates 12 V.I.C. § 903(b)(11) by depriving the public of its right to be involved in and review coastal zone planning and development.

VII. IMPROPER PARTICIPATION OF A COMMISSIONER WITH A CONFLICT OF INTEREST.

92. St. John CZM Committee member Brion Morrisette is a lessee of Parcels 10-17, 10-18, 10-19 and 10-41 Rem Estate Carolina under long term leases giving him and his co-lessee, Robert O'Connor, Jr. the right to develop the properties.

93. Morrisette executed a time-limited, fully revocable, power of attorney to SEG giving it the right to apply for the Permit as Morrisette's (and Robert O'Connor,

Jr.'s) attorney-in-fact.

94. The power of attorney was submitted to CZM and was made a part of the file and the sufficiency of this power of attorney to allow SEG to receive a permit as the developer of the property was an issue before the CZM Committee.

95. On August 20, 2014, the St. John CZM Committee held a public hearing on the Permit along with the Water Permit. At the hearing, commissioners Penn, Roberts and Morrisette established the quorum necessary to allow the hearing to occur and then heard testimony from SEG and many members of the public.

96. At the decision meeting on October 1, 2014, the same three commissioners established the quorum necessary to allow the commission to meet.

97. The CZM rules and regulations, 12 V.I.R.&R. § 904-6(d), prohibit a Commission member from using his "official position to aid or impede the progress of or approval of a Coastal Zone application in order to further his own pecuniary interest, ..."

98. At the decision meeting on October 1, 2014, Morrisette, acknowledged that he had a conflict of interest [since he had a pecuniary interest in the lease of the four properties and acted as counsel for one of the land owners as well as one of the principals of SEG] and abstained from voting; but, he still participated in the meeting to maintain the quorum. Indeed, he stated that he was participating for the purposes of ensuring that there would be a quorum. Morrisette's participation allowed the other members to vote. The remaining members voted 2-0 to grant the

Permit to SEG.

99. Morrisette's participation in the August 20, 2014 hearing for the purposes of establishing a quorum "aid[ed] . . . the progress of . . . of . . . a Coastal Zone application." Thus, his participation, even if only for the purposes of creating the quorum, was contrary to law.

CONCLUSION

100. CZM-STJ's actions were arbitrary and capricious and failed to comply with the CZMA. It erred because it:

a. failed to consolidate the two permit applications and consider the cumulative impact of the development upon the entire coastal zone;

b. failed to consolidate the two permit applications and therefore did not subject the land-aspects of the development to the scrutiny required in 12 V.I.C. § 911;

c. granted the permits when SEG had failed to prove that it had the required legal interest in the properties and authority to develop the properties;

d. granted the permits when the EARs were insufficient, both as a matter of law and of fact;

e. failed to make any findings of fact that allowed its decisions to be properly reviewed on appeal;

f. failed to make all of the conclusions required by 12 V.I.C. § 911(c);

g. made some of the conclusions (by adopting CZM Staff recommendations) required by 12 V.I.C. §§ 910 and 910(c) when those conclusions are not

supported by the substantial evidence of record;

h. failed to state the basis for the rental calculations for the Water Permit as required by the CZMA;

i. imposed improper conditions upon the Water Permit; and

j. proceeded to consider the permit with the participation of a Committee member who was disqualified from taking any steps to advance the progress of the permit.

101. The decision of VIBLUA was erroneous because it

a. consolidated, without any statutory authority, the Land Permit and Water Permit instead of vacating the two permits when it recognized that they were improperly considered separately;

b. affirmed the decision of CZM-STJ despite all of the errors listed above.

REQUESTED RELIEF

VICS prays that after due proceedings, this Court:

A. grant its writ of review;

B. order that no surety bond under Rule 15(b) of the Rules of the Superior Court is required, in as much as any decision of the Court is unlikely to result in an order directed at VICS that would require surety to ensure compliance;

C. direct the clerk of court to issue the writ to the Respondent with instructions that the Respondent shall return the writ to the Court within 20 days together with a certified copy of the record;

D. direct the Respondent to answer the petition, and, direct that in each instance where Respondent denies an allegation of the petition the Respondent cite to the portions of the record that it asserts support the denial;

E. after Respondent has answered the petition, establish a briefing schedule; and

F. reverse the decision of the Board of Land Use Appeals and remand with instructions that the Board of Land Use Appeals remand the permits to CZM-STJ with instructions that the Permits be vacated.

Respectfully submitted,

LAW OFFICES OF ANDREW C. SIMPSON, P.C.
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July 5, 2016

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Certification of Counsel

I, Andrew C. Simpson, an attorney and member of the Virgin Islands Bar certify that I have examined the processes and proceedings of the Board of Land Use Appeals and the Coastal Zone Management Committee and the decisions ands determinations sought to be reviewed, and in my opinion, they are erroneous. I further certify that this petition is not filed for delay.

ANDREW C. SIMPSON