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-395** **PETITION FOR WRIT OF REVIEW**

MEMORANDUM OF LAW IN SUPPORT OF WRIT OF REVIEW

Now comes the Virgin Islands Conservation Society, Inc. ("VICS"), through undersigned counsel, and submits this memorandum of law in support of its petition for writ for review.

BACKGROUND

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. One of the two applications, APPX-43,[1] was for the development of the "land-side"

[1] For the convenience of the Court and the parties, VICS has created a CD-ROM Appendix with a complete copy of the record below, with pages designated as APPX-__. This Appendix consists of the following:

- The certified record from the Department of Planning and Natural Resources' ("DPNR") Certified Record of Proceedings (APPX-1 to APPX-668);
- the Environmental Assessment Report for the water permit application (APPX-669 to APPX-1288 (which was included with the documents submitted by DPNR but erroneously left off of the certified list of proceedings);

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").

The second application was for the "water-side" of the same marina complex. APPX-5. 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

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- the Environmental Assessment Report for the land permit application (APPX-1289 to APPX-1403) (which was erroneously not included by DPNR in the certified record or the documents submitted to VICS (and presumably the Court)); and
- the record from the Board of Land Use Appeals (APPX-1404 to APPX-1907).

This CD-ROM Appendix is submitted to the Court simultaneously with this memorandum and a copy has been provided to all parties.

DPNR-CZM.

On June 18, 2014, DPNR-CZM deemed both applications complete. APPX-98. On August 20, 2014, the St. John CZM Committee ("CZM-STJ") conducted a public hearing on both applications. APPX-180. Prior to this public hearing, CZM-STJ received extensive commentary on the project from governmental entities, non-governmental entities and individuals. These submissions overwhelmingly either criticized the application or opposed the proposed development as inappropriate. The submissions included the following:

» APPX-104: League of Women Voters of the Virgin Island (criticizing the completeness of the application and raising questions about the proposal);

» APPX-106: Environmental Association of St. Thomas ("EAST") (raising concerns about: the impact upon water quality; lack of sufficient information about erosion controls; and the wastewater treatment facility);

» APPX-108: National Ocean and Atmospheric Administration ("NOAA") (raising concerns about impact upon seagrass beds and water quality; failure to consider a smaller marina as an alternative; the sufficiency of information regarding pile driving; water quality; the lack of information about hurricane plans; and impacts upon fish habitat);

» APPX-110 and APPX-133: The V.I. Department of Public Works (identifying concerns about the proposed parking facility and the volume of increased traffic on the roadway adjacent to the project; criticizing the sufficiency of the plans);

» APPX-111 and APPX-370 to APPX-498: Coral Bay Community Council (stating that the marina was too large for the resources; criticizing the location within Coral Bay; generally criticizing the EARs as insufficient and for making claims without adequate documentation to support the claims; and providing a detailed (over 100 page) analysis of the proposal and the EARs);

» APPX-130: The Moravian Church (objecting that the proposed development infringes upon its littoral rights);

» APPX-144: U.S. Fish and Wildlife (concluding that the proposed mitigation actions were insufficient to offset the damage to submerged aquatic vegetation);

» APPX-349: William McComb, environmental consultant (criticizing the separation of the two permit applications and providing detailed criticism of the EARs);

» APPX-361: University of the Virgin Islands Cooperative Extension Service (generally criticizing the vagueness of the EARs);

» APPX-363: National Park Service (expressing "concern about the potential negative impacts to the resources of the Virgin Islands National Park and Virgin Islands Coral Reef National Monument).

During the public hearing, which could not accommodate the overflow crowd, numerous people and entities also spoke out against the proposal.

The August 20, 2014 public hearing could not have taken place without a quorum of three members of CZM-STJ. 12 V.I.C. § 904(b). At the public hearing, there were only three members present (including one who attended via Skype from California)

APPX-198. However, one committee member, Brion Morrisette, acknowledged that he had a conflict of interest but nevertheless elected to attend the meeting to create the quorum and therefore allowed the application process to proceed. APPX-199 to APPX-201.

On October 1, 2014, CZM-STJ held a decisional meeting on the two applications. APPX-623. Once again, only three commissioners were present for the meeting. Commissioner Brion Morrisette again acknowledged that he had a conflict of interest but nevertheless participated in the meeting for the purposes of establishing a quorum. APPX-633 to APPX-636. Commissioner Morrisette abstained from voting on the applications and the applications were approved by a 2-0 vote. APPX-647.

CZM-STJ issued written Major CZM Permits CZJ-03-14(L) ("the Land Permit") (APPX-654) and CZJ-04-14(W) ("the Water Permit") (APPX-661) on October 24, 2014. VICS filed timely appeals of the above mentioned permits with the Board of Land Use Appeals on November 14, 2014. APPX-1563. The Virgin Islands Board of Land Use Appeals ("VIBLUA") held a hearing on VICS's appeal (as well as on related appeals filed by other parties) on April 5, 2016. APPX-1404. 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. APPX-1540 to APPX-1541. On June 6, 2016, VIBLUA issued its written decision reflecting the vote held at the April 5, 2016 hearing. A copy of that decision was attached as Exhibit 4 to VICS's petition for writ of review.

STANDING

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. APPX-244 to APPX-247. VICS also submitted written comments detailing why both the Land Permit and the Water Permit should be denied. APPX-247, although they do not appear as part of the official record.[2] VICS is an "aggrieved person" as defined by 12 V.I.C. § 902(a) and thus has standing to pursue the writ of review.

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

The Virgin Islands Coastal Zone Management Act establishes the development and environmental protection policies for the territory. A development policy within the first tier[3] of the Virgin Islands Coastal Zone is to guide new development "where it will have no significant adverse effects, individually *or cumulative*,[sic] on coastal zone resources." 12 V.I.C. § 906(a)(1). (Emphasis added.) 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. Although "cumulative impact" is not defined in the

[2] A copy of the written statement submitted by VICS is attached as Exhibit 1 to this memorandum.

[3] The coastal zone of the Virgin Islands is divided into two tiers. 12 V.I.C. § 908. The Virgin Islands Code refers to them as the first tier and second tier. *Id.*. In common parlance, they are referred to as Tier I and Tier II. Tier I encompasses the underwater resources of the Virgin Islands and continues inland, across the shoreline, until it reaches the point on the map where Tier II begins. Generally speaking, the portion of Tier I that is on land is a relatively narrow strip of land that forms a ring around the outer circumference of each of the major islands of the territory.

VICZMA, it is a well-understood term in the context of construction and development activities.

> Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and *reasonably foreseeable future actions* regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7 (emphasis added).[4]

Cumulative impact analysis requires a CZM applicant to therefore explain all of the environmental impacts of its own proposed development in the context of prior and future development. With this information properly presented as part of the CZM application process, the CZM Committee can, and must, consider how the proposed development will "work" within the context of the entire area as it exists and as it may be modified by other projects that are reasonably anticipated.

The requirement to consider cumulative impact is a common sense requirement: as more development is authorized in a particular area, the cumulative impacts can easily surmount the individual impacts. (As an example, imagine a development that impacts a nearby river by removing 5% of the daily volume of water from the river. Such an impact might be acceptable. But, if four additional sites also each seek to

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[4] *See also* Zhao Ma, Dennis R. Becker & Michael A. Kilgore (2012): Barriers to and opportunities for effective cumulative impact assessment within state-level environmental review frameworks in the United States, Journal of Environmental Planning and Management, 55:7, 961-978, at 961 ("Cumulative environmental impacts are the incremental effects of a single action in the context of other related past, present and foreseeable future actions regardless of who undertakes them.") (citing Council on Environmental Quality 1997).

remove 5% of the daily volume of water, the cumulative impact might be to lower water levels below the intake pipes for municipal water suppliers downstream.

A. CZM DID NOT EVEN CONSIDER THE CUMULATIVE IMPACT OF THE TWO HALVES OF THE SEG APPLICATION.

SEG wishes to build one marina but submitted its application in two halves and persuaded CZM-STJ to consider them as separate applications rather than as one. One application dealt with the land-side of the marina proposal. The second application dealt with the water-side of the same marina proposal. The EAR submitted in support of the application for the Land Permit admits in Section 9 that "this project is entirely dependent on the adjacent marina project." APPX-1398. Further, the water-based marina (included as part of the Water Permit application) has limited infrastructure (other than the docks and moorings) and relies solely upon infrastructure (management and marina support offices, emergency generators, restrooms, locker rooms, fuel storage, potable water supply, marine sewage holding tanks and parking) that was included in the application for 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" (APPX-213) 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." APPX-221. SEG never once referred to the

proposed development as two projects at the public hearing.

To make waters worse, although SEG isolated the environmental *impacts* of the the marina project by placing some in one half and the rest in the other half, 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. *Compare* APPX-870 (Water EAR) and APPX-1390 (Land EAR) (both referring to the economic impact of the marina and projecting that it will contribute $8786,500 to the local economy. 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.

BLUA has previously held that 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.[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). By considering the two

[5] A copy of this decision was attached as Exhibit 5 to VICS's petition for writ of review.

applications as stand-alone projects, CZM-STJ failed to consider the cumulative impacts of the entire marina project. For this reason alone, the permits must be vacated.

Even if it was appropriate for CZM to consider the two applications separately, it was still required to consider the overall cumulative impact that would result from the activities authorized by the combination of the two applications . 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, in SEG's case, 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. The study of sediment in the water-based EAR dealt solely with historical sediment and run-off combined with sediment caused by in-water marina construction (*e.g.*, sediment caused by pile driving) and did not include any assessment of the impact from run-off during construction of the facilities authorized by the land-based permit.

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.

SEG's decision to submit separate applications, when the two were integrally part of a single project, allowed it to arbitrarily reduce the level of scrutiny applied to the

overall project. 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). When SEG excluded activities associated with the land permit from consideration as part of the water permit, it created the means by which those activities could escape the scrutiny required by the CZMA.

One example of a land-based activity that escaped full scrutiny and how it relates to the marine environment is 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. APPX-1317. In addition to affecting air quality, these emissions can affect water quality as they land on the water. These emissions, when quantified, can also be mitigated as part of addressing the environmental impact of the overall development. 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).

A water permit also may not be granted unless the

> grant of such 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.

12 V.I.C. § 911(c)(2).

CZM did not consider the public good or public interest of the activities authorized by the land permit even though they should have been considered in reaching the

statutorily required conclusions. The land permit authorizes fuel storage tanks, the sewage holding tanks, and construction which traverses the sole access road to communities south of the project (Federal Highway 107). All of these activities present impacts to public health, safety and general welfare. A fire in the fuel tanks (which are in proximity to residences), the impact of the truck traffic for pumping out the sewage holding tanks and filling the fuel storage tanks and similar impacts were all matters of public interest that should have subjected to the scrutiny of the application as part of the overall consideration of the water permit. What happens if there is a fuel spill during a hurricane that closes off the sole escape route to the people living south of the project? 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.

As described above, "cumulative impact" is not limited solely to the CZM applicant's proposal; and, it includes reasonably foreseeable future development. In SEG's case, the plan by the Moravian Church to build a proposed marina is reflected in the public record. APPX-130. SEG did not provide CZM-STJ with any information regarding the cumulative impact of having two large marinas built in tiny Coral Bay. And, rather than insist that SEG provide such information, CZM-STJ gave no consideration to the cumulative impacts of other existing or planned development in the area.

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

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

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

Additionally, with respect to a permit that includes the development of the submerged lands of the Virgin Islands, CZM-STJ was required by 12 V.I.C. § 911(c) to make the following *conclusions*:

- 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;
- 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;
- 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;
- that there will be compliance with the United States Virgin Islands territorial air and water quality standards;
- that the occupancy and/or development will be adequately supervised and controlled to prevent adverse environmental effects; and
- 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.

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).[6] However, it did not

[6] While it may be technically acceptable for a CZM Committee to simply adopt the conclusions and recommendations made by staff, the practice undermines the credibility of the resulting decision by the Committee as it leaves an appearance that the members of the Committee failed to perform their statutory role of actually deliberating and considering the various requirements of the CZMA and the merits and criticisms of the proposed development.

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).

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.

"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.

In Conclusion of Law No. 11 of the decision on appeal (Exhibit 4 to VICS's petition for writ of review), VIBLUA concluded that the Final Staff Recommendations of CZM

staff "contain[ed] the legally sufficient findings." However, it is CZM-STJ – not Staff – that statutorily must make the findings of fact. Staff is limited to making recommendations. CZM-STJ did not even summarily adopt the CZM staff's recommendations regarding the facts. CZM-STJ's failure to make the required findings of fact required the reversal of the permit; VIBLUA's conclusion that the non-existent findings of fact were sufficient because staff had *recommended* facts is an error of law that requires reversal of that decision.

Because there are no findings of fact, this Court is hampered in its ability to review the decision of CZM-STJ. At a minimum, CZM-STJ's failure to make findings of fact requires that its decision be reversed and remanded with instructions to reconsider its decision after making appropriate findings of fact.

III. 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.

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). 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). 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). Further, 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* APPX-75.

The Land Permit, APPX-654, authorizes SEG to develop Parcel Nos. 10-17, 10-18, 10-19, 10-41 Rem, 13A, l3B and 13 Rem, all of Estate Carolina. SEG did not own any of these parcels.[7] None of the record owners (identified in footnote 7) co-signed the permit application. Parcels 10-17, 10-18, 10-19 and 10-41 Rem were all leased by their respective owners to Brion Morrisette and Robert O'Connor, Jr. APPX-743 and APPX-758. Neither Morrisette nor O'Connor co–signed the CZM permit applications.

SEG obtained a limited power of attorney from either the owners of record[8] or the tenants (Morrisette/O'Connor) "for the sole and limited purpose of providing [SEG] the

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[7] Parcels 10-17 and 10-18, Estate Carolina were owned by Eglah Marsh Clendenin and Minerva Marsh Vasquez as Trustees of the Marsh Sisters Trust. APPX-745 and APPX-747. Parcels 10-19 and 10-41 Rem, Estate Carolina were owned by Calvert Marsh, Inc. APPX-760 and APPX-763. Parcel 13 Rem, Estate Carolina was owned by Jim Phillips and Genova Rodriguez. APPX-767. Parcels 13A and 13B Estate Carolina had been the subject of a Marshal's Sale to Merchants Commercial Bank. APPX-780. The order confirming the sale was subject to the owner's right of redemption. APPX-781. There was no Marshal's Deed in the record. On June 23, 2014, prior to the CZM decision, Merchants Commercial Bank assigned its certificate of sale for Parcel 13A to Estate Carolina, LLC. 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 was attached as Exhibit 6 to VICS's petition for writ of review.

[8] With respect to Parcels13A and 13B, Merchant's Commercial Bank provided the power of attorney. APPX-770. However, as noted in footnote 7, before the CZM application was acted upon by CZM-STJ, Merchants Commercial Bank assigned its certificate of sale to a third party, Estate Carolina, LLC. Since at that point Merchants Commercial Bank had no ability to apply for a CZM permit (because it no longer owned any interest in the property), the power of attorney was terminated by operation of law.

legal authority *to apply for* a CZM Permit. APPX-741, APPX-765, APPX-770. (A power of attorney for parcels 10-18 and 10-19 does not appear in the official record.)

SEG's sole evidence that *it*, the applicant, had any legal right relating to any of the parcels consisted of these limited powers of attorney which only gave it the authority to *apply for* a CZM permit. SEG submitted no evidence establishing that it had the legal right to *develop* any of the parcels as required by the CZMA.

In addition to the fact that the powers of attorney did not authorize SEG to develop any of the property, the limited powers of attorney were revocable and expired (either in December 2014 or on January 1, 2015) or upon revocation, whichever first occurred. APPX-741, APPX-765, APPX-770. Thus, even if the powers of attorney were to be interpreted as authorizing development rather than merely applying for a permit, they did not meet the requirement that the authority be irrevocable.[9] No one with legal authority to develop the property signed the CZM permit application.

Parcel 13A provides an excellent example of why whoever signs a permit application must possess the *irrevocable* power to develop the property. Here, the power of attorney given by Merchant Commercial Bank was limited and revocable; and it was automatically revoked on December 1, 2014 if it was not revoked earlier. APPX-

[9] That the authority must be irrevocable is another common sense requirement. Otherwise someone could get a permit, commence development, perhaps to the point where land has been cleared, only to have the owner revoke the authority. At that point, the permittee would be powerless to take steps to stablize the site and prevent environmental degradation; and the site could remain in a partially developed, perhaps environmentally unstable, status for an indefinite period of time.

770. Merchant Commercial Bank's assignment of the certificate of sale to 13A Estate Carolina, LLC, was completely contrary to the limited authority that it granted with the power of attorney; therefore, the assignment revoked, as a matter of law, the limited power of attorney given to SEG with respect to Parcel 13A.

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.

The determination that the application was complete was arbitrary and capricious. *See Grapetree Bay Homeowner's Ass'n*, p.20 (CZM Committee's failure to follow its own regulations "constitutes an arbitrary and capricious act"). In this case, the determination of completeness was particularly arbitrary because the permit was issued to SEG which, even if the powers of attorney were sufficient, only had power to apply for the permit *in the name of the principals*. SEG had no legal authority to develop the land and did not seek the permit in the name(s) of any person or entity who did have that authority.

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

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 the statutory criteria under which it might be approved. 12 V.I.C. § 910(e)(2). Pursuant to 12 V.I.C. § 902(o), the "Environmental Assessment Report" is an "informational report prepared by the permittee [and] available to public agencies and the public in general," *Id.* 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." *Id.*

SEG's Environmental Assessment Reports did not include the detail that the CZMA requires. In addition to failing to address the cumulative impact of development (discussed in detail, above), SEG's EARs failed to address, *inter alia*, (and without limitation) the following:

1. THE EAR DID NOT ADDRESS THE SEWAGE TREATMENT REQUIREMENTS FOR THE ENTIRE MARINA PROJECT

The EAR supporting the application for the Land Permit describes sewage treatment solely for the land-based aspect of the proposal. It states that 10,830 gallons/day of sewage (from toilets, sinks, etc.) will be treated in the sewage treatment facility. APPX-1320. It gives no consideration to the wastewater generated by the 145 boats in slips in the marina. It gives no explanation as to how the limited land area of the property – much of it developed – can absorb the treated effluent as irrigation

water. Cisterns will be sized to accommodate only four days of effluent volume, which means that there will be a need for frequent trips by licensed haulers to bring the effluent to the V.I. Waste Management treatment plant in Cruz Bay, thereby increasing the load on that facility.

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. APPX-809. There is no assessment of the impact of this additional wastewater upon the Virgin Islands Waste Management Authority. This additional wastewater must have *some* impact upon VIWMA – but none is disclosed in the report. Nor is it possible to determine wether the holding tank is adequately sized for the anticipated quantities of wastewater.

One aspect of wastewater generation was completely omitted from SEG's EAR. 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:

- little detail was provided regarding the location, management and stability of the pump-out storage facility;
- no plans or mitigation measures were considered to substantially lessen or eliminate the adverse impacts of a spill from the pump-out facility;
- there was no discussion of the tank design and how spills would be

contained;

- there was no management plan for depositing and removing sewage from the storage tank.
- there was inadequate information such that the project's impact upon water quality could be properly addressed.

At a minimum, an appropriate EAR would have addressed the following sewage treatment issues:

» 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;

» How the discharge of grey water (in excess of the capacity needed for irrigation) into the marina project's drain fields would affect water quality;

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

» the design of the drain fields; and

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

2. THE EAR DOES NOT INCLUDE A PLAN FOR IMPLEMENTATION OF, AND MAINTENANCE OF, SEDIMENT AND RUN-OFF CONTROL DEVICES

An EAR will typically provide information to CZM regarding the sediment and run-off control devices that the applicant will use during construction. This information will include the types of devices to be used; identification of where the devices are deployed around the site; and a maintenance schedule (to ensure that the devices are working properly). The SEG EARs are silent with respect to any land-based devices for the control of run-off.

With respect to underwater sediment issues, SEG did not provide any information regarding the turbidity controls (turbidity curtains) it wishes to use 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:

- providing no information about the placement or depth of the turbidity curtains;
- not addressing how construction vessels and barges could enter and exit the construction site without causing a release of suspended particles beyond the curtains;
- establishing that the turbidity curtains were practical for the actual wave activity anticipated at the site;
- 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.

3. THE EAR DOES NOT INCLUDE ADEQUATE INFORMATION REGARDING THE REQUIRED ANALYSIS OF ALTERNATIVES TO THE PROPOSED DEVELOPMENT

The CZMA specifically requires an applicant to provide "an identification and analysis of reasonable alternatives to such development." 12 V.I.C. § 902(o). Such a requirement in environmental planning is known as "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. While the CZMA does not specify what should be included in the alternatives to the proposed development section, the Code of Federal Regulations provides a reasonable framework for the type of analysis that is expected:

> (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
>
> (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
>
> (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
>
> (d) Include the alternative of no action.
>
> (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
>
> (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

40 C.F.R. § 1502.14.

SEG's discussion of "the heart of" the EAR is woefully deficient. The Alternatives to Proposed Action are found at APPX-886 (Water EAR) and APPX-1398 (Land EAR). In each case, SEG essentially discusses the alternatives with a focus solely upon the "alternative" that it desires. There is no discussion of building a smaller marina; or of building a shore complex that supports boats on moorings with a much smaller dock area; and, critically, there is no discussion of competing proposals, such as the Moravian Church's proposed marina, as a viable option to SEG's marina.

4. THE EARS DO NOT ADDRESS EMISSIONS OF PARTICULATE MATTER AND OTHER AIR POLLUTANTS (BOTH EARS)

The release of particulate matter during construction has been a significant health issue in recent years (in particular, during construction of the Christiansted Bypass and during a lengthening of the airport runway on St. Croix). Methods to control dust and other particulate matter during construction are thus important issues that should be discussed in an EAR. SEG's EARs do not discuss the issue or describe the methods that it will use to prevent particulate matter from migrating offsite during construction. In a construction site located near the water, such as SEG's proposed site, the release of particulates can also affect the marine environment through sedimentation. That impact, too, must be addressed. SEG ignored the issue.

5. THE EARS FAIL TO PROVIDE SUFFICIENT WATER QUALITY DATA

An important part of the environmental assessment involving marine impacts is establishing the existing water quality and then assessing 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.

The starting point for this analysis is establishing the baseline – what is the water quality currently? The more pristine the existing water quality, the more important it is to have such a baseline. One issue affecting the baseline in Coral Bay is the fact that significant improvements in water quality have been made in Coral Bay over the past few years. Local efforts to curb runoff, completed in 2012, have been successful, leading to important improvements in water quality. Consequently, it was important that SEG use water quality data from samples collected after these drainage improvements were completed. Instead, SEG used samples and studies almost exclusively taken prior to 2012, thereby presenting 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.

To add insult to injury, SEG failed 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). Instead, SEG glibly stated that "[d]uring construction, a turbidity and seagrass monitoring program will be implemented to insure that water quality standards are maintained. APPX-798. It included as an appendix a "water quality monitoring plan" (APPX-1242) that is

woefully short on detail. Baselines "will be established" (APPX-1243) and allowable limits of increased turbidity "will be determined." APPX-1244. If problems are encountered, they "will be identified and methods worked out to reduce suspended sediments." APPX-1246. While these statements may sound good, they are meaningless – they are standardless.

6. THE WATER EAR DID NOT HAVE AN APPROPRIATE ANALYSIS OF THE WAVE ACTION IN CORAL BAY

The Water EAR did not 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 raised questions as the viability of the marina and the quality of the yachting experience in the marina given its exposure to waves. *See, e.g.,* APPX-371, APPX-462, APPX-465.

7. THE EARS DO NOT ADDRESS THE IMPACT OF THE INCREASED MARINE TRAFFIC THAT THE MARINA WILL GENERATE

The EARs were silent as to the impact that the increased marine traffic (as a result of the marina) would have on the limited safe hurricane harbors in the Virgin Islands. Hurricane holes are already crowded with existing boats. There should have been a discussion as to where the 145 boats in the marina are expected to ride out a storm.

8. THE EARS DO NOT HAVE CONTINGENCY PLANS FOR HURRICANES

Related to the failure to address the impact of the additional boats on hurricane

planning, SEG also failed to address contingency plans relating to hurricane damage to the marina and the shore side facilities. What is the plan for when large sections of the docks, along, perhaps, with many boats, are blocking the sole ingress and egress to the communities south of the project? What is the plan if the fueling facilities are damaged during a hurricane? SEG's approach to these issues was to simply say that it would have a plan. The plan was not disclosed, even though SEG admitted that "a comprehensive [hurricane contingency plan] is an absolute necessity." APPX-875.

9. THE EARS DO NOT INCLUDE FEASIBLE OR ADEQUATE MITIGATION MEASURES

SEG failed to propose feasible or adequate mitigation measures – a problem specifically identified by U.S. Fish and Wildlife. ("we believe the proposed mitigation actions do not adequately compensate . . ." APPX-145.) A key component of any EAR is the measures that are proposed to mitigate those environmental impacts that cannot be feasibly avoided. In this instance, SEG proposes to transplant seagrass to other locations within Coral Bay to provide an alternative habitat for the seagrass beds that will be destroyed in the process of building a marina. Seagrasses, of course, are important forage areas for the endangered sea turtles that are found in Coral Bay.

SEG did not provide the information in its EAR that would have allowed CZM-STJ to determine whether the proposed transplantation of the seagrasses was feasible. There was no evidence that the proposed transplant location was suitable habitat; nor were criteria established by which success of the mitigation effort could be considered so that if the transplantation program was failing, alternatives could be explored. SEG

gave no consideration 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 because of the presence of the transplant site off of 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 – a "problem" created by the equivalent of SEG throwing its problem over the neighbor's fence.

The evidence established that the proposed location for transplanting the seagrasses was an area where seagrasses have previously been destroyed by high sedimentation or excessive water flow. APPX-350. SEG failed to produce evidence that the same result would not occur with the transplanted seagrasses.

There were also serious questions about the sufficiency of the mitigation effort. APPX-145. 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.

SEG did not include a discussion in the EAR about the mitigation of other construction impacts. The dock construction will result in damage due to barge spuds and tugboat propeller wash. SEG proposed no mitigation measures and instead improperly delegated responsibility for controlling this damage to unknown contractors. APPX-807. SEG stated that these contractors would be provided with a

"construction management plan." *Id*. No such construction management plan was included in the application and thus CZM could not review it.

Finally, the proposed "out-of-kind" mitigation through the planting of mangroves was insufficiently described. No adequate plan was provided for this proposed mitigation measure: Where will it occur? What follow up will there be after the mangroves are planted to ensure that they survive and thrive? How will success be defined? Who will monitor the success of transplantation project. What alternative mitigation efforts will be deployed if the mangroves do not "take" after they are planted?

10. SEG FAILED TO PROVIDE SUFFICIENT INFORMATION ABOUT THE MOORING FIELD

SEG did not 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, APPX-803; but, 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.

11. SEG DID NOT PROPERLY ADDRESS THE IMPACT UPON ENDANGERED SPECIES IN THE EAR

SEG admitted in its EAR that the seagrass beds in Coral Bay were "forage habitat for endangered sea turtle species." APPX-803. SEG also acknowledged that its project would "impact seagrass beds" which are "considered a critical foraging habitat for sea turtles. APPX-850. SEG also admitted that construction activity had the potential to impact endangered coral species "due to water quality impacts and due to vessel strikes." APPX-851. Despite these admissions, SEG offered no substantive solutions to eliminate or minimize such impacts.

12. THE EAR DOES NOT DISCUSS THE POTENTIAL IMPACT OF THE DEVELOPMENT UPON NEARBY SIGNIFICANT AREAS OF MARINE RESOURCES

SEG omitted from the EAR any consideration of the potential for the marina to impact 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.

13. THE EAR DOES NOT COMPLY WITH CZM'S SUPPLEMENTAL EAR GUIDELINES

To assist developers so that they know exactly what is expected of them in varioius situations, CZM has developed supplemental EAR Guidelines for Marina Development. (A copy of these guidelines is attached as Exhibit 2.) SEG simply ignored the

Supplemental EAR Guidelines. These guidelines provide important management measures that "must" be addressed in an EAR as well as "recommended measures" that can be used to implement the required management measures.

14. THE EAR DOES NOT ASSESS THE IMPACT OF THE DEVELOPMENT UPON THE FISHERIES

The proposed marina will destroy spawning and feeding habitat for fish in Coral Bay. One would expect an EAR for a project such as this to include a survey of fish habitat to determine the variety of fish species that use the habitat; how they use it; and how construction and or marina operation might impact the fisheries. There was insufficient information as to the impact upon the fishing community due to the destruction of critical habitat.

15. THE EAR DOES NOT ADDRESS THE IMPACT OF THE PROJECT UPON SHORELINE ACCESS FOR FISHERMEn

The marina project will substantially curtail 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 the active presence of fishermen currently on the subject property and shoreline.

16. THE EAR ASSESSMENT OF THE BENEFICIAL ECONOMIC IMPACT IS UNSUPPORTED

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. Coral Bay Community Council submitted a far more detailed analysis that

demonstrated that SEG's analysis was insufficient. APPX-374.

17. SEG PROVIDED NO INFORMATION THAT WOULD ALLOW CZM-STJ TO ASSESS THE ENVIRONMENTAL IMPACT OF DRIVING 1,333 PILES INTO THE SUBMERGED LANDS

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." APPX-824.. SEG plans to drive 1,333 piles. APPX-827. To begin with, the fact that SEG hedged this section with "conditions permitting" is a "tell" that SEG does not have adequate information. The EAR should fully analyze the conditions and then propose pile driving only if conditions will allow and the impacts of such construction are disclosed and minimized or mitigated. 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.

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.

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

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.

The basis for the calculation of the rental fees was not included as part of the Water Permit. After the fact, a statement of the basis for negotiations was issued. APPX-652. It appears that the submerged lands where the proposed transplanting of seagrasses will take place is not included in the calculation.

V. THE WATER PERMIT WAS SUBJECT TO IMPROPER CONDITIONS.

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

CZM-STJ abdicated its authority by issuing a permit with conditions that bypass the CZM Committee review process. In doing so, CZM-STJ gave SEG or other unknown parties the primary responsibility for implementation of the provisions of the CZM Act that apply to the permit conditions.

One such condition is the requirement in the Water Permit that the turbidity curtains be installed at an "adequate depth" in order to prevent suspended sediments

from migrating outside the work area. In setting this condition, the Committee necessarily acknowledges that the information necessary to determine the appropriate depth was unknown at the time it rendered its decision. Critically, the condition presupposes that there is an adequate depth at which the curtains will perform properly.

Similar proposals in the EAR discussed above, such as the plan to develop a hurricane contingency plan; the intent to enter into an agreement with DPNR regarding the mooring fields; and the plans to develop criteria for determining when water turbidity is excessive; are other examples of kicking the planning down the road – after the permit has been issued – thereby preventing the plans from being assessed as part of the permit application.

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.

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

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. As described above, 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. The power of attorney was submitted to CZM and was made a part of the record; further 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. Commissioner Morrisette readily acknowledged his conflict of interest. APPX-199 to APPX-201.

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. APPX-198. At the decision meeting on October 1, 2014, the same three commissioners established the quorum necessary to allow the commission to meet. APPX-626.

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, ..." At the decision meeting on October 1, 2014, Morrisette revealed that 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 acknowledged that he had a conflict of interest as a result. However, rather than completely remove himself from the process, Morrisette determined that while he would abstain from voting, he would nevertheless participate 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.APPX-647.

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.

The requirement of a quorum is not a mere technicality. It reflects the Legislature's determination that on important matters such as CZM permitting, it is important to have several people watching over the interests of the community. The three members of the quorum are not expected to be puppets. They are expected to deliberate. In this case, the community was deprived of the deliberations of a third person because of Commissioner Morrisette's conflict of interest.

VII. VIBLUA LACKED THE AUTHORITY TO CONSOLIDATE THE TWO PERMITS

At both the CZM level and then on appeal to VIBLUA, VICS and other aggrieved parties objected to CZM-STJ's failure to consider the cumulative impacts of development. VIBLUA agreed that each permit application was dependent upon the

other and determined that "they must be treated as one permit application." *See* VIBLUA decision Conclusion of Law No.14 (attached as Exhibit 4 to VICS's petition for writ of review). 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. Unfortunately, rather than reverse the issuance of the two permits and remand with instructions to CZM-STJ to consider the cumulative impacts of the two proposals (along with the cumulative impact of other development, including future development), VIBLUA simply ordered that the two permits be consolidated.

VIBLUA's decision to consolidate was erroneous for two reasons. First, it did not address CZM-STJ's error in failing to consider the cumulative impact of development. Consolidating the two permits without requiring an assessment of that the cumulative impact of the development did not cure the fact that CZM-STJ had not reviewed the cumulative impact of the development. Second, VIBLUA had no authority to consolidate the two permits on appeal. VIBLUA's appellate authority is limited to "either approv[ing] or deny[ing] an application for a coastal zone permit." 12 V.I.C. § 914(d).

VIII. BLUA FAILED TO GIVE A WRITTEN REASON FOR ITS DECISION

On June 6, 2016, VIBLUA issued its written decision on the Land and Water Permits 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) (emphasis

added). The only findings of "fact" made by VIBLUA are a recitation of facts relating to the *procedural* history of the permit applications. Thus, VIBLUA did not fulfill its statutory obligation to detail the findings of fact upon which its decision was based.

CONCLUSION

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

- failed to consolidate the two permit applications and consider the cumulative impact of the development upon the entire coastal zone;
- 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;
- 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;
- granted the permits when the EARs were insufficient, both as a matter of law and of fact;
- failed to make any findings of fact that allowed its decisions to be properly reviewed on appeal;
- failed to make all of the conclusions required by 12 V.I.C. § 911(c);
- 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;
- failed to state the basis for the rental calculations for the Water Permit as required

by the CZMA;

- imposed improper conditions upon the Water Permit; and
- 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.

The decision of VIBLUA was erroneous because it

- 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;
- failed to include the required findings of fact; and
- affirmed the decision of CZM-STJ despite all of the errors listed above.

For the foregoing reasons, the Court should 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,

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September 20, 2016

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing documents, along with the exhibits and the CD-ROM appendix, were served via U.S. Postal Service first class mail, postage prepaid, on September 20, 2016, upon the following:

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