BEFORE THE BOARD OF LAND USE APPEALS

VIRGIN ISLANDS CONSERVATION SOCIETY, INC., **APPELLANT** **V.** **ST. JOHN COMMITTEE OF THE VIRGIN ISLANDS COASTAL ZONE MANAGEMENT COMMISSION** **APPELLEE** **SUMMERS END GROUP, LLC** **INTERVENOR**	**LAND USE APPEALS** **NO. 002 /2020**

BRIEF OF APPELLANT

SUMMARY OF ARGUMENT

Summers End Group has refused from Day One to submit a CZM application that complies with Virgin Islands law. It's latest effort—the subject of this appeal—is just another attempt to take a shortcut around the CZM process. "Like most shortcuts, it was an ill-chosen route" Washington Irving, The Devil and Tom Walker.

This latest shortcut has resulted in multiple infirmities in the "consolidated permit" that was signed by one member of the St. John CZM Committee. For example, the "consolidated permit" incorporates documents that are not a part of the certified record of this appeal and were not a part of the previous permits that were the subject of the prior appeal in this matter. Further, even assuming that a single CZM Committee member could consolidate the permits on his own (a concept rejected by the Legislature), the shortcut resulted in a permit

that cuts in half the bonding requirement that this Board imposed when the two halves of this project were on appeal before it back in 2017.SEG has embarked upon an ill-chosen route and this Board should vacate the "consolidated permit."

BACKGROUND

The proposed marina and associated infrastructure that is the subject of this appeal was previously before the Board in Appeal Nos. 005-6/2014 and 008/2014 ("the prior appeal"). On June 6, 2016, the Board of Land Use Appeals issued its decision in the prior appeal.[1] In rendering its decision, this Board specifically held that the two separate permit applications were required to be treated as one. *See* Exhibit 2 to the Notice of Appeal, pp.4-5 (Finding No. 14). The CZM Committee has never reviewed the two permit applications as one.

On March 27, 2019, the Chairman of the St. John Committee of the Virgin Islands CZM Committee, Andrew Penn, re-signed the "submerged lands permit" (Permit No. CZJ-04-14(W)) notwithstanding this Board's order of June 6, 2016 requiring consolidation of the permits.[2] On October 28, 2019, the Legislature, sitting as a Committee of the Whole, held a lengthy hearing on the permit and on December 10, 2019 Senate President Novelle E. Francis, Jr. wrote to the Governor and explained that the Legislature had determined that

[1] Exhibit 2 to the Notice of Appeal. *See*The decision in the prior appeal remains the subject of writ of review proceedings pending in the Superior Court of the Virgin Islands under Case Nos. ST-16-CV-395 and ST-16-CV-428 (the two cases have been consolidated).

[2] A copy of this re-signed submerged lands permit was attached to the Notice of Appeal as Exhibit 3.

it was unable to take action on the permit as it was "considered defective."[3]

The Legislature specifically concluded that the re-signed permit had not been approved by the St. John Committee of the CZM Commission but had only been signed by the Chairman of the St. John Committee without a vote of approval or any other involvement of the St. John Committee." *Id.* The Legislature stated, "This lack of a vote invalidates the permit. Since the permit is considered invalid, it cannot be ratified by the Legislature and is therefore improperly before the Legislature." *Id.*

Importantly, the Legislature also noted,

> the defect cannot be resolved merely by submitting the original permit approved by the St. John Committee and the Governor in 2014. As the applicant's testimony and correspondence has disclosed, *the project described and approved in 2014 is no longer the project the applicant intends to develop today. Neither the 2014 permit nor the 2019 permit truly reflects or conforms to the applicant's current proposal for the development of a marina.* Consequently. Coastal Zone Management Permit No. CZJ-04-14(W) authorizing a project that is different from the project that Summer's End actually intends to develop is not properly before the Legislature.

Id. (emphasis added).

and

> It is the consensus of the Legislature that the marina project proposed by Summer's End Group, LLC *has not been yet submitted for CZM review, thereby rendering this permit and all related processes invalid*.

Id. (emphasis added).

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[3] A copy of the December 10, 2019 letter was attached to the Notice of Appeal as Exhibit 4.

A mere six days after the letter from Senate President Francis, the Chairman of the St. John Committee of the CZM Commission ignored the Legislature's specific statement that he lacked the authority to act on his own. In open defiance of the Legislature, he signed yet another permit ("the new permit") that had not yet been acted upon by the St. John Committee. The new permit (which is the subject of the instant appeal), purports to consolidate the two permits originally issued in 2014. It is expected that SEG, an intervenor in this appeal, will argue that the new permit is merely a technicality and does something that it believes this Board authorized: merely combining the two permits into one. However, even if such a technicality was authorized by the CZM Act—it is not—the shortcuts taken by SEG caused this new permit to be markedly different than a combination of the two separate land and water permits.

To make matters worse, the Governor then illegally modified the permit that had already been illegally issued by Commissioner Wood. The Governor lacked the legal authority to modify the permit; moreover, while ostensibly modifying the permit to reduce its impact, the Governor also added a new aspect of the project, a shoreline boardwalk, that was never a part of the original design and has never received CZM approval.

JURISDICTION

SEG has filed a motion to dismiss, claiming that this Board has no jurisdiction. SEG takes the incongruous position that the "consolidated permit" signed by the Chairman of the St. John CZM Committee is not appealable because it was not action "by the Commission, its Committees, or the Commissioner." SEG Motion to Dismiss at 2 (quoting 12 V.I.C. § 914(a)). That's a dangerous—indeed fatal—position for SEG to take.

The CZM Act provides that the "appropriate Committee of the Commission shall act upon a major coastal zone permit." It is well-established law that the "conclusive legal event" is when the permit is issued, in writing. *La Vallee Northside Civic Asso. v. Virgin Islands Coastal Zone Management Comm.*, 866 F.2d 616, 624 (3d Cir. 1989) ("Neither the Commission's initial vote of approval nor its later reconsideration of the permit conditions was the conclusive legal event. Further formal action by the Commission was both contemplated and required before the favorable vote was to be considered effective."). SEG is confronted with a Hobson's choice: Either the signature of the Chairman of the St. John CZM Committee was an action on behalf of the Committee, in which case SEG possesses a permit which can be appealed; or it was not an action of the Committee and there still is no permit.

VICS contends—just as the Legislature found with respect to the March 2019 permit—that the signature of a Committee Chairman alone is not sufficient to issue a permit when the Committee has not authorized the permit. The absence of Committee approval renders the "consolidated permit" a nullity. This is supported by the affidavits of two members of the Committee who affirm that they did not vote to issue the permit or authorize the Chairman to sign the permit on behalf of the Committee. *See* Exhibits 9 and 10 attached to the Notice of Appeal." Ironically, the argument that the issuance of the permit was unauthorized is also the practical result of the position adopted by SEG—it argues that there is nothing for VICS to appeal because the Committee did not act. To the extent that this Board holds that the "consolidated permit" is a nullity, then VICS agrees that there is nothing to appeal and the Board has no jurisdiction. And SEG has no permit.

But, if the Board concludes that the "consolidated permit" is a viable document, then it can only do so because it has concluded that the act of the Chairman of the St. John CZM Committee was an act on behalf of the Committee as a whole. Of note in this regard, the signature line of the Chairman is directly below the title of the Committee: "St. John Committee of the Virgin Islands CZM Commission" and is signed by Andrew Penn in his capacity as Chairman. If it was an act on behalf of the Committee as a whole (as the document purports to be), then an appeal to this Board lies, because it was an action by the Committee. Unfortunately for SEG, such a finding does not solve its dilemma—there may be jurisdiction, but this Board must still reverse because the Chairman was without authority to sign on behalf of the Commission when the Commission did not vote to approve the permit and did not authorize the Chairman to sign the permit.

There is a second jurisdictional question that arises if, and only if, the Board concludes that the "consolidated permit" is not a nullity and that it therefore has jurisdiction over an appeal from the issuance of the "consolidated permit" (and the Board does not reverse due to the lack of the Committee Chairman's authority). That second jurisdictional question is whether the Board has appellate jurisdiction over the modification to the permit imposed by the Governor. VICS submits that the answer to that question, at least under the unique factors present in this case, is "yes."

The uniqueness in this case is that the "consolidated permit" was signed by the Chairman on December 16, 2019 and then approved by the Governor on December 18, 2019—the same date that the Governor then modified the permit. At the time the Notice of Appeal was filed (January 30, 2020), the permit had already been modified by the Governor

and it is *that* permit, as modified, that is before this Board.[4] The Board has jurisdiction because the appeal was timely filed from the putative decision of the Committee. The fact that the Governor changed the permit does not deprive this Board of jurisdiction.

THE APPLICANT'S REQUEST TO MODIFY THE PERMIT REQUIRES NEW CZM REVIEW

It is important to recognize that the Governor did not modify the "consolidated permit" on his own initiative. As the Governor's letter of December 18, 2019 (Exhibit 8 to the Notice of Appeal) acknowledges, SEG *requested* a modification to its permit. SEG did not follow the requirements of the law for seeking a modification of its application and/or permit.

The CZM Commission, acting in accordance with 12 V.I.C. § 910(e) has established procedures for two types of modifications relating to CZM permits. The first is for amendments to *applications* for major CZM permits. Modifications to applications are governed by 12 V.I.R.&R. § 910-4(b), which allows amendments to applications for major CZM permits at any time within 30 days of receipt of the original completed application or at least 30 days before the public hearing, *whichever is earlier*. *Id.* Significantly, if a proposed amendment "would substantially modify the scope, nature or characteristics of the proposed development, the original proposal shall be deemed withdrawn." 12 V.I.R.&R. § 910-4©.

The second procedure is for modifications of *approved* CZM permits. A modification to an existing permit is governed by 12 V.I.R.&R. § 910-14. An application for the

[4] There might be a different result if the Governor had modified the permit after a notice of appeal was filed but while the appeal was pending; but, that issue is not before the Board.

modification of an approved CZM permit "shall be treated as a new application for a Coastal Zone Permit *unless* the Commissioner [of DPNR] determines that such modification would not substantially alter or modify the scope, nature or characteristics of the existing permit or approved development." 12 V.I.R.&R. § 910-14(a) (emphasis added). Moreover, even if the Commissioner finds that the proposed modification would not substantially alter or modify the scope, nature or characteristics, the CZM Committee "may nevertheless impose such conditions to approval of the modification as it deems necessary" to satisfy the provisions of the CZM Act. 12 V.I.R.&R. § 910-14(b).

It appears, based upon SEG's jurisdictional argument, that it believes that it had a valid permit at the time it made the December 3, 2019 request for a modification of the permit. (Note that the request for the modification preceded the Chairman's signature on the "consolidated permit" by two weeks. Once again, SEG has been too clever by half.

If, as SEG now contends, it was seeking a modification of an existing permit, then the procedure was to make the request to the Commissioner of DPNR—not to the Governor. *Unless* the Commissioner of DPNR made a specific finding that the proposed modification would not substantially alter or modify the scope, nature or characteristics of the proposed development, however, a new permit application *was required*. The Commissioner of DPNR made no such finding.

Even if SEG were to change its tactics mid-stream and now attempt to argue that it was seeking to amend its application for a permit, the time for doing so, in accordance with the CZM regulations, expired more than 5 years earlier and there could be no amendment.

THE GOVERNOR LACKED THE AUTHORITY TO MODIFY THE PERMIT

Governor Bryan's December 18, 2019 letter purports to be an exercise of the power granted to him under 12 V.I.C. § 911(g) to modify a permit. But, 12 V.I.C. § 911(g) states that "the Governor may modify or revoke any coastal zone permit that includes development or occupancy of trust lands or submerged or filled lands *approved pursuant to this section* upon a written determination that such action is in the public interest and that it is necessary to prevent significant environmental damage to coastal zone resources and to protect the public health, safety and general welfare." (Emphasis added.) The "approv[al] pursuant to this section" referenced in 12 V.I.C. § 911(g) refers to an earlier portion of Section 911, which requires that the permit be approved by the Governor and ratified by the Legislature. 12 V.I.C. § 911(e). Since the Legislature has not yet ratified any permit relating to the SEG proposal, the Governor lacks the power to modify the permit as set forth in Subsection 911(g).

Subsection 911(g) is not intended as a vehicle to correct major deficiencies (such as those manifest in SEG's CZM permit applications) through a gubernatorial modification that completely bypasses the CZM permitting process. Rather, the subsection specifies that it is "[i]n addition to any other powers of enforcement set forth in [12 V.I.C. § 913]." The power that is granted is intended to allow the Governor to exercise emergency power when it becomes clear that an approved project involving submerged lands is causing, or will cause, "significant environmental damage to coastal zone resources." The Governor's determination in this case that the proposed development would cause "significant environmental damage" was made *on the same day that he approved the permit*. How

could it be that he approved the permit under the CZM Act and simultaneously concluded that the proposed development would cause significant damage requiring that he modify the document he had just approved? The fact that he modified the permit the same day he approved it is clear proof that the permit applications were defective from Day One and should never have been approved. The "modification" process initiated by SEG is simply an attempt by it to shortcut the proper process because it knows that its project has changed significantly and that the only way to deal with the changes is to submit a new permit application. SEG *knows* that it must submit a new permit application because the Legislature has directly informed it that must do so.

THE NEW PERMIT IS *NOT* A MERE COMBINATION OF THE TWO EARLIER PERMITS

Contrary to claims made by SEG, the new, consolidated, permit does not reflect a mere combination of the earlier land and water permits that this Board determined could not be issued as separate, unconsolidated, permits. There are key distinctions between the December 2019 permit and the 2014 permits.

The new permit incorporates by reference as Exhibit I the 2014 water permit and as Exhibit II the 2014 land permit. But, the new permit expressly incorporates exhibits to those earlier permits *that are not the same exhibits* that were parts of the original water or land permits. For example, Exhibit A to Exhibit I is described as a CZM Permit Application dated June 7, 2012 and amended on March 21, 2014. The 2014 water permit, however, incorporated a CZM Permit Application dated April 4, 2014. Similarly, the site plans for the new permit are incorporated in Exhibit I as Exhibit B and are drawings dated June 7, 2012 and amended on March 21, 2014. But the site plan and drawings in the 2014 water permit that are

incorporated as Exhibit B in that permit are dated July 11, 2014. The environmental assessment report incorporated as Exhibit C to Exhibit I in the new permit is dated June 7, 2012 and amended on March 21, 2014 whereas the Environmental Assessment Report incorporated in the original water permit is dated April 4, 2014. On the "land side," Exhibit B to Exhibit II of the new permit is described as "Site Plan and Drawings dated June 11, 2014 where as the Exhibit B to the original land permit consisted of "Site Plan and Drawings dated July 11, 2014." Finally, the new permit does not even comply with the requirement imposed by this Board four years ago when it determined that the two permits could not proceed separately. The Board noted that each of the separate permits required a performance bond in the amount of 20 percent of the estimated cost of construction, up to a maximum of $5 million. The Board directed that because the permits needed to be consolidated, the maximum bond requirement should be increased to $10 million. However, the new permit caps the maximum bond at $5 million.

SEG seems to argue that consolidating the two permits into one permit was a mere ministerial task. Even if the law allowed such shortcuts, however, the new permit does not accomplish that arguably simple, ministerial, task. Instead, it incorporates entirely different documents and fails to adhere to the Board's mandate that the maximum size of the bond be increased to $10 million. Critically, the documents described above that are now incorporated in the "consolidated permit" were not a part of the record on appeal the first time this development was before the Board and they are not a part of the record on appeal filed by CZM this time around, either. The "approved" permit with documents that were not a part of the original review has *never* been given a review by CZM.

THE GOVERNOR'S MODIFICATION *INCREASES* THE ENVIRONMENTAL IMPACT OF THE PROJECT

The Governor had no legal authority to modify *this* permit. The CZM Act gives the Governor a limited power to modify a permit *only* if "it is necessary to prevent significant environmental damage to coastal zone resources and to protect the public health, safety and general welfare." 12 V.I.C. § 911(g). The statute does not authorize the Governor to modify the permit to include items that *expand* a project or *increase* its environmental impact.

At a minimum, the Governor made two modifications to the permit that were not authorized under subsection 911(g). First, as the Governor admits in his December 18, 2019 modification letter (Exhibit 8 to the Notice of Appeal), he has modified the permit to include a shoreline boardwalk. There has been no review by CZM of the addition of this boardwalk along the shoreline. This change, which has nothing to do with limiting damage to the environment, raises a number of important environmental issues:

- Drawings submitted by the Governor to the Legislature with his modification letter show that the boardwalk will require 64 concrete, square, piles sized at 14" per side. What is the impact of this method of construction and the driving of these piles into the ground?
- Will the boardwalk affect the rights of adjacent property owners (it appears that part of the intent of adding the boardwalk is to connect the parts of the property that are now disconnected due to the loss of control over parcels 13A and 13B).
- Is the boardwalk to be constructed on submerged lands? (As a practical matter, it must be constructed on submerged lands given the limited area between the existing road and the waterline.)

- If the boardwalk will be constructed on or over submerged lands, has the occupancy of this portion of the submerged lands been properly calculated for purposes of determining the submerged land lease payments due to the Government of the Virgin Islands?

Second, the removal of parcels 13A and 13B from the project eliminates a significant portion of the *mitigation of* environmental damage that was a key component of SEG's project. As described at page 50 of the transcript of the public CZM hearing (APPX--229),[5] SEG was "providing water treatment for the entire Bordeaux Mountain watershed. This is all a part of our mitigation plan." This plan involved "storm water improvement to the gut between Voyages [n.b., parcel 13A] and the 41-Remainder property." *Id.* SEG further explained during the hearing that the drainage gut between Voyages and 41-Remainder would "flow[] into our facility [which] has a barrier for silt and sediment provided." APPX-344–45. SEG further explained that it was managing the storm water runoff entering the "entire gut" going up "in a V, up the mountain." APPX-346.

With the removal of Parcel 13A from the project, SEG is no longer able to divert the amount of runoff that it anticipated diverting into its retention basins to be built on Remainder 41. The gut that SEG intended to divert lies almost entirely upon the Parcel 13A portion of the boundary between Parcel 13A and Remainder 41. While SEG may be able to come up with a means to divert the portion of the flow through the gut that runs over

[5] The transcript of the public hearing is omitted, along with numerous other documents, from the "certified" record filed in this matter in March 2020. It was a part of the certified record in the prior appeal and it is not clear why it is missing. VICS is filing as an appendix a copy of the prior certified record with pagination to assist the Board. Pages are designated as "APPX-__".

Remainder 41, it lacks the legal capacity to enter upon Parcel 13A and divert any flow from the Parcel 13A portion into SEG's retention basins. This is a significant environmental impact and the Governor's arbitrary removal of Parcel 13A fails to address it. To the contrary, the Governor's action merely serves to confirm what has been evident ever since SEG lost control of Parcels 13A and 13B—that it must submit a new CZM permit application.

THE LEGISLATURE'S REJECTION OF THE APPLICATION REQUIRES THE SUBMISSION OF A NEW APPLICATION AND NEW CZM REVIEW

SEG tried—and failed—to get the Legislature to approve the permit in 2019. The Governor submitted the March 2019 permit, which was signed solely by the Chairman of the St. John CZM Committee, to the Legislature for approval on October 28, 2019, The Legislature rejected the request . The Legislature specifically found that the chairman of the St. John CZM Committee does not have the power to approve a permit absent the participation and approval of the St. John CZM Committee and the lack of a vote by the Committee "invalidates the permit." Exhibit 4 to the Notice of Appeal, p.1. Further, the Legislature held, based upon SEG's testimony at the legislative hearing and SEG's correspondence, that "the project described and approved in 2014 is no longer the project the applicant intends to develop today. *Neither* the 2014 permit nor the 2019 permit truly reflects or conforms to the applicant's current proposal for the development of a marina." *Id.* (emphasis added). It was "the consensus of the Legislature that the marina project proposed by Summer's End Group, LLC has not been yet submitted for CZM review, thereby rendering this permit *and all related processes* invalid. *Id.* (emphasis added). The Legislature directed SEG to submit a new (consolidated) permit application to CZM and

seek the issuance of a new (consolidated) permit. *Id.*

SEG's latest effort, submitting a "consolidated permit" to the Chairman of the St. John CZM Committee without going through the permit application and review process is a slap in the face of the Legislature and represents yet another attempt by SEG to obtain a CZM permit without complying with Virgin Islands law. The "consolidated permit" issued by the Chairman of the CZM Committee is invalid and this Board should so rule.

THE NEW PERMIT IS INVALID FOR MANY OTHER REASONS

Because the "consolidated permit" signed by the Chairman of the St. John CZM Committee is a new permit, it must comply with Virgin Islands law. There are a number of deficiencies in the "consolidated permit" that require only brief mention.

1. SEG FAILED TO SHOW THAT IT HAS PAID ITS TAXES AND FILED REQUIRED REPORTS.

As is apparent from the Certified Record filed in this appeal by CZM, SEG did not provide certification from the Bureau of Internal Revenue and Department of Finance that it had filed and paid all taxes, penalties and interest. Nor did it submit proof that it had filed its required annual report with the Office of the Lieutenant Governor. Proof of payment/filing (or that the applicant has made arrangements to pay/file) is a requirement of granting a permit. 12 V.I.C. § 910(a)(2). It was error for the Chairman of the St. John CZM Committee to sign off on the "consolidated permit" when this requirement was not met.

2. THE CZM COMMITTEE STILL HAS NOT MADE THE FINDINGS REQUIRED BY THE CZM ACT.

There has *never* been a finding by the St. John CZM Committee that the development is consistent with the basic goals, policies and standards provided in 12 V.I.C. §§ 903 and 906.

Likewise, there has *never* been a finding by the St. John CZM Committee 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. As then-Judge, now-Justice, Swan held, these findings are required by 12 V.I.C. § 910(a)(2). *Environmental Ass'n of St. Thomas and St. John v. Virgin Islands Bd. of Land Use Appeals*, 31 V.I. 9, 18 (Terr. Ct. 1994) (concluding that the CZM Committee acted arbitrarily and capriciously when it approved a permit without "addressing" section 910(a)(2)). The required findings were missing from the original permit in 2014 and the "consolidated permit" fails to correct this arbitrary and capricious failure.

In a similar fashion, the CZM Committee has *never* made the findings required by 12 V.I.C. § 911©. The law requires that the Committee make the following findings:

- that the application is consistent with the basic goals of 12 V.I.C. § 903 and with the policies and standards of 12 V.I.C. § 906;
- that the grant of the 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 the 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; and
- that the occupancy and/or development will be adequately supervised and controlled to prevent adverse environmental effects.

The required findings were missing from the original permit in 2014 and the "consolidated permit" fails to correct this arbitrary and capricious failure.

The absence of these required findings makes it impossible for this Board to review the permit to determine whether the proposal meets the requirements of the CZM Act.

There are numerous other reasons why the "consolidated permit" is invalid:

- It was issued without any consideration of the cumulative impacts of other development in the area, including the Moravian Church's proposed marina.
- SEG failed to prove that it had 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).
- The owners of the property proposed for development did not co-sign the application as required by law. V.I.R.&R. § 910-3(b).
- Any determination that the application for the consolidated permits was complete (to the extent such a determination was even made) was arbitrary and capricious because it clearly was not complete. It lacked proof of ownership. If the determination was not made, then the permit is void because the failure to follow the requirements of law is itself an arbitrary and capricious act.
- Regardless of which Environmental Assessment Report was used (the "consolidated

permit" makes reference to an Environmental Assessment Report that is not a part of the Certified Record), the EAR did not meet the requirements of the CZM Act and thereby precluded the CZM Committee from making a determination that the proposed development complied with the statutory criteria under which it might be approved. 12 V.I.C. § 910(e)(2). The EAR is deficient because it fails to:

1. address the cumulative impact of development (discussed above);
2. 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 include:

a. failure to provide information regarding the location, management and maintenance of the pump-out storage facility;

b. there are no plans or mitigation measures to substantially lessen or eliminate the adverse impacts of a spill from the pump-out facility;

c. there is no discussion of the tank design and how spills would be contained;

d. there is no management plan for depositing and removing sewage from the storage tank.

3. provide adequate information such that the project's impact upon water quality could be properly addressed. Specifically, the following is missing:

a. An explanation as to 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;

b. An explanation as to 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;

c. information on the location of the drain fields (how can the environmental impact be ascertained when the locations of the drain fields are not identified?);

d. information on the design of the drain fields;

e. adequate information about the erosion and sedimentation controls that

were to be used during construction

4. include adequate information regarding the required analysis of alternatives to the proposed development;
5. include a plan to address emissions of particulate matter and other air pollutants;
6. 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.
7. 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);
8. 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.
9. address the impact that the increased marine traffic (to the marina) would have on the limited safe hurricane harbors in the Virgin Islands.
10. address contingency plans relating to hurricane damage to the fueling

facilities and for dealing with fuel spills to prevent spills from reaching the nearby shoreline mangroves.

11. 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).

12. propose feasible or adequate mitigation measures. Specifically, but without limitation:

    a. There was insufficient information provided from which CZM could have concluded that the proposed transplantation of sea grass was feasible: there was no evidence that the proposed transplant location was suitable; 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 sea grasses).

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

c. 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.

13. 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:

    a. SEG provided no information about the placement or depth of the turbidity curtains;

    b. SEG did not address how construction vessels and barges could enter and exit the construction site without causing a release of suspended particles beyond the curtains;

    c. SEG did not establish that the turbidity curtains were practical for the actual wave activity anticipated at the site;

14. 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.

15. consider mitigation of construction impacts. The dock construction will result in damage from barge spuds and tugboat propeller wash. SEG proposed no mitigation measures 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.

16. 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.

17. prove that the proposed "out-of-kind" mitigation through the planting of mangroves was sufficient. No adequate plan was provided of this proposed mitigation measure.

18. eliminate, or even address, impacts upon endangered species. SEG admitted in its EAR that the sea grass 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 sea grass 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.

19. 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. The CZM Act, 12 V.I.C. § 911(b)(1)(A), requires an EAR that adequately states the prevailing conditions of the site *as well as of adjacent properties*.

20. 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.

21. 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.

22. 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.

23. provide detail or support for SEG's rosy economic projections. Among other deficiencies, SEG only included positive economic impacts while pretending that negative economic impacts did not exist.

24. provide sufficient information regarding the pile driving impacts. 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.[6] 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.

25. provide information regarding the sonic impact of the pile driving upon endangered species or steps that would be taken to minimize such impacts.

The new permit is also invalid because it fails to set forth the basis for the submerged land rental fees as required 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

[6] This does not include the 68 new pilings associated with the new boardwalk.

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. In this case, the basis for the calculation of the rental fees was not included as part of the permit. 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 and the new boardwalk).

The basis for calculation is important because, 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.

Yet another reason the new permit is invalid is that it is subject to improper conditions. 12 V.I.R.&R. § 910-11(b) and © 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. However, the new permit illegally usurps this authority by giving SEG (or other unknown parties) the primary responsibility for implementation of the provisions of the CZM Act rather than the CZM Committee. For example, the new permit includes a condition that the turbidity curtains need to be installed at an "adequate depth" in order to prevent suspended

sediments from migrating outside the work area. This condition establishes that additional information was necessary (so that the adequate depth could be stated rather than leaving it to the discretion of the permittee), but was not submitted to the Committee beforehand for review. Moreover, it assumes, without any evidence, that there is any adequate depth at which the curtains will perform properly.

Belated conditions such as the ones set forth above are specifically prohibited by the CZM Act, *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.

CONCLUSION

We can expect an emotional plea from SEG in its opposition brief, objecting that its project is being delayed. But the truth is that the delay is entirely of SEG's own making. SEG decided to shortcut the process from the very beginning when it insisted upon submitting separate permit applications for the land and water portions of its project. That foolish decision—which this Board has recognized was wrong—has caused all of SEG's problems and delays. It made that decision because it wanted to evade Virgin Islands law rather than

comply with it. Delays are going to continue to plague SEG until it once and for all decides to comply with the law.

This Board should not be swayed by SEG's emotional pleas. The Board's task is to apply the law. That task requires, in this case, that the "consolidated permit" be vacated. Further, VICS submits that this time the Board should make clear what was implicit in its prior decision (and which the Legislature has now validated)—that SEG must submit a new, consolidated, permit application to CZM for full CZM review if it wishes to ever have any chance of proceeding with this development proposal.

Respectfully submitted,

April 6, 2020

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was served upon on April 6, 2020, via email as follows:

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