EXHIBIT B

STATEMENT OF COMPLAINT AGAINST THE DECISION

APPEAL
Before the BOARD OF LAND USE APPEALS

Virgin Islands Conservation Society, Appellant, v. St. John Committee of the Virgin Islands Coastal Zone Management Commission, Appellee.	)	LAND USE APPEALS NO.

EXHIBIT B
STATEMENT OF COMPLAINT AGAINST THE DECISION

Pursuant to the rights afforded by V.I. Code Ann. tit. 12, § 914, Virgin Islands Conservation Society ("VICS" or "Appellant"), as an aggrieved person, appeals the decision of the St. John Committee of the Virgin Islands Coastal Zone Management Commission ("St. John CZM Committee" or "Committee") to grant Major CZM Permit No. CZJ-03-14(L) ("the Permit") to Summer's End Group, LLC. As demonstrated below, the St. John CZM Committee has failed to make all requisite findings, under V.I. Code tit. 12, §§ 903 and 906; disregarded V.I.R. & Regs. tit. 12, § 904-6(c) and (d) by allowing participation by a committee member with a glaring conflict of interest; and granted the Permit, although SEG had no legal interest in or right to develop the property that is the subject of the Permit.

Summary of Facts and Law

Section 910(a)(2) of the Coastal Zone Management Act ("CZMA") mandates that a Committee shall only grant a permit for development if the Committee finds that the development is consistent with the goals, policies and standards delineated in the CZMA, including a mandate that the CZMA Rules and Regulations are followed. Further, permits are

granted only upon complete applications in accordance with the CZMA Rules and Regulations, and illegal proceedings tainted by participation of committee members with conflicts of interest are expressly forbidden. For these reasons, Appellant seeks a complete reversal of the decision and denial of Permit No. CZJ-03-14(W).

Summer's End Group, LLC ("SEG") submitted its application on April 4, 2014 to the Department of Planning and Natural Resources Division of Coastal Zone Management ("CZM") to re-develop seven parcels of land including Parcel Nos. 10-17, 10-18, 10-19, 41-Rem, 13A, 13B and 13 Rem Estate Carolina., No. 1 Coral Bay Quarter, St. John, U.S. Virgin Islands. The application included the construction of 4 commercial buildings that will house restaurants, a U.S. Custom and Border Protection office, a marina office, marina security office, crew showers and facilities, marina support and management facilities, 6 short-term rental units, pump-out facilities, a sewage treatment facility (or rather 5 self-contained units), a public dinghy dock and parking spaces.

On August 20, 2014, the St. John CZM Committee held a public hearing to consider both the application for the land-based development and for the construction of a 145-slip marina with a mooring area under the application for Major Permit No. CZJ-04-14(W) ("Water Permit"). The decision meeting was held on October 1, 2014. Commissioner Andrew Penn presided over both the public hearing and the decision meeting. In both cases, Penn, along with Brion Morrisette and Edmund Roberts, established a quorum. At the decision meeting, after the CZM Staff recommendations were read into the record, Committee members Penn and Roberts voted unanimously to approve the application. Morrisette abstained from voting. The St. John CZM Committee issued Major CZM Permit No. CZT-03-14(L) to SEG on October 24, 2014.

I. **No Proof of Legal Interest in SEG and No Authority to Develop**

One glaring deficiency in the permit application was that SEG failed to show proof of legal interest and its authority to develop any of the parcels on which development will occur, namely, Parcel Nos. 10-17, 10-18, 10-19, 41-Rem, 13A, 13B and 13 Rem Estate Carolina, in accordance with V.I.R. & Regs. tit. 12, § 910-3(b). As a result, CZM was required to deem the application incomplete in accordance with V.I.R. & Regs. tit. 12, § 910-7(a)(3).[1]

Section 910-3(b) states, in pertinent part:

> Upon filing an application, the applicant(s) shall be required to evidence in writing his legal interest in and right to perform development upon all property upon which work would be performed if the application were approved, including submission of all relevant legal documents. Where the applicant(s) is not the owner(s) of the property, the owner(s) must co-sign the application before it will be accepted for filing, except when the owner is the Government of the Virgin Islands...(*emphasis supplied.*) [2]

First, none of the current owners of the properties signed the application. Second, the following facts demonstrate that there was no other proof of legal interest or authority in SEG to develop the named parcels.

Parcel Nos. 10-17, 10-18 Estate Carolina. As proof of legal interest for Parcel Nos. 10-17 and 10-18, SEG submitted deeds in the name of Eglah Marsh Clendenin and Minerva Marsh Vasquez, as Trustees of the Marsh Sisters Trust, and a Short Form Lease between the Trust, as Landlord, and Robert O'Connor, Jr. and Brion Morrisette, as Lessees. In addition, SEG submitted a power of attorney from O'Connor and Morrisette. Not only did the power of

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[1] 12 V.I.R.R. § 910-7(a)(3) states, in pertinent part: The factors to be included in every determination of completeness shall include:....(3) Proof of adequate legal interest, including submission of all relevant legal documents, co-signatures of owner(s) of the property where the applicant is not the owner...

attorney not transfer any legal interest in the property to SEG, it limited SEG's powers as follows:

> [F]or the sole and limited purpose of providing said attorney-in-fact the legal authority to apply for all Virgin Islands Department of Planning and Natural Resources and/or Coastal Zone Management and/or United States Army Corps of Engineers permits to enable the development and construction of a marina and related structures...

There was no other documentation provided giving SEG any interest or legal authority to develop the properties. Thus, SEG had no legal interest in or any right to develop the named properties. The application was accepted, although CZM could not be assured SEG had the legal authority to develop the property or that the owner gave approvals for SEG's plan to develop.

Parcel Nos. 10-19 and 41-Rem Estate Carolina. Parcel Nos. 10-19 and 41-Rem are owned by Calvert Marsh, Inc. A Short Form Lease, identical to that provided for Parcel Nos. 10-17 and 10-18, was given by Calvert Marsh, Inc. to O'Connor and Morrisette. The same power of attorney used for Parcel Nos. 10-17 and 10-18, included Parcels 10-19 and 41-Rem. There was no additional documentation submitted to show proof of interest in the parcels. Thus, there was no legal interest in SEG or authority to develop Parcel Nos. 10-19 and 41-Rem.

13 Rem Estate Carolina. Parcel No. 13 Rem is owned by Jim Phillips a/k/a James Phillips and Genoveva Rodriquez. Phillips and Rodriguez gave SEG a limited power of attorney with the same language as with Parcels Nos. 10-17 and 10-18. This document is not legally sufficient as proof of SEG's legal interest in the property. Moreover, it was limited to a right to apply for the Permit, a well as other applicable permits. There was no right to develop the property granted to SEG.

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[2] The Proof of Legal Interest form requests, in addition to proof of legal interest, irrevocable approvals, permission or power of attorney from all persons with legal interest to undertake the work proposed in the permit.

13A and 13B Estate Carolina. As proof of legal interest in Parcel Nos. 13A and 13B, SEG submitted deeds and an Order Confirming the Marshal's Sale of the Property to Merchants Commercial Bank (MCB). Not only was the Order Confirming Sale subject to the owner's right of redemption, there was no Marshal's deed granting MCB the property. Moreover, the comments submitted to CZM, included an Assignment of Certificate of Sale from MCB to Estate Carolina, LLC dated June 23, 2014. MCB assigned any rights it had in the property to an entity unrelated to the application.

SEG also presented a limited power of attorney from MCB to SEG. This limited power of attorney could not transfer any legal interest to SEG. Even if it could, MCB had no rights to confer to SEG after the assignment. Thus, any rights SEG had to apply for the permit was relinquished on June 23, 2014 by the assignment. MCB essentially revoked the power of attorney. As a result, the Permit was issued even though SEG lost its right to apply for the Permit. Thus, any permit allowing development of Parcels 13A and 13B is illegal.

The SEG application for the land-based development clearly did not contain proof of legal interest or the requisite signatures of the owners of the properties to be developed and should not have been deemed complete. Moreover, there was no power provided to develop any of the properties. For this reason, the application should not have been deemed complete as prescribed by 12 V.I.R.R. § 910-7(a)(3). Under § 906(a)(9), the Permit should not have been granted without compliance with the CZMA rules and regulations. The Committee failed to act within the limits of its statutory powers and acted upon unlawful procedure. The decision was also made contrary to 12 V.I.C. § 906(a)(9).

II. Illegal Participation by a Conflicted Commissioner

SEG's application included a plan to develop Parcels 10-17, 10-18, 10-19 and 41 Rem Estate Carolina. Brion Morrisette, who is a member of the St. John CZM Committee, along with his partner, Robert O'Connor, Jr. leases these parcels under two long term leases granting them possession and the right to develop the properties. Both Morrisette and O'Connor provided a power of attorney to SEG granting it the right to apply for the Permit, as well as other required permits. The power of attorney was submitted to CZM and was made a part of the file. The right to develop remained in Morrisette and O'Connor. Neither Morrisette or O'Connor signed the application as owners or lessees.

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 a quorum and heard testimony from SEG and many members of the public. At the decision meeting on October 1, 2014, all three commissioners established a quorum and adopted all of the findings and recommendations of the CZM Staff without making any new findings. Mr. Morrisette, however, abstained from voting, but he still participated in the meeting to maintain the quorum, which allowed the other members to vote. The remaining members voted unanimously to grant the Permit to SEG.

The public hearing and decision meeting were clearly held upon unlawful procedure. Commissioner Morrisette participated in both hearings by establishing a quorum, sitting through the hearings and, on at least two occasions, whispering to the Chairman during the public hearing. Moreover, he helped SEG's application process by giving a power of attorney to SEG to apply for the Permit. The right to develop the property remained with Morrisette and

O'Connor. Thus, as one of the lessees of the property who stands to benefit if the project goes through, Mr. Morrisette should not have participated in any way in the SEG application and should have disqualified himself or been disqualified by the Chairman. Despite Mr. Morrisette's conflict of interest, he helped to establish a quorum and engaged somewhat with the Chairman during the public hearing.

The CZM rules and regulations have provisions that allow for self-disqualification or disqualification by the chairman after appropriate proceedings. *See* 12 V.I.R.R. § 904-6(d). The record is devoid of any such proceedings having been conducted regarding the SEG applications, and Mr. Morrisette never disqualified himself. Since no less than three members are required for a quorum, and Mr. Morrisette should have been disqualified, his participation made the public hearing and decision meeting illegal. Thus, the decision was void under 12 V.I.R.R. § 904-6 and 12 V.I.C. § 904(b).

III. No Consideration of Cumulative Impacts

The Permit should have been combined with the Water Permit. The separation was used by SEG to avoid providing a comprehensive picture of the adverse impacts of both land and water developments. It also prevented the Committee from fully considering the cumulative impacts of the entire project, pursuant to 12 V.I.C. § 903(b)(4), which requires the Committee to assure the orderly, balanced utilization and conservation of the resources of the coastal zone.

The Land EAR states in Section 9, Alternatives to Proposed Project, "this project is entirely dependent on the adjacent marina project." Indeed, without the land-based development, the marina would not have electricity, emergency generator service, marina support and management facilities, restrooms and locker rooms, or parking. Without the CZM Water Permit,

the land-based development will be unnecessary. Thus, both applications should have been considered together, and not just for SEG's convenience. For instance, SEG justified its economic benefit claims by combining the value of the marina and the upland development. When it came to the adverse environmental impacts, however, the marina and the land-based development were addressed separately. When it is convenient for SEG, it combines the marina and the upland development. Both land and marina developments should have been considered to provide a full analysis of the adverse environmental impacts. Failure to do so is contrary to 12 V.I.C. § 903(b)(4).

Erosion and Sedimentation

The impacts from erosion and sedimentation are greater when the projects are considered together. It is probable that land-based and water-based construction can occur at the same time substantially increasing the impacts on water quality and damage to seagrasses and other benthic habitat. Since the EARs for water and land address control mechanisms differently, conflicts are certain to arise during the implementation stage and will lead to difficulty enforcing the permits. A joint approach to controlling erosion and sedimentation should have been required.

Sewage Disposal

Additionally, the EAR estimates that 10,830 gallons/day of sewage (from toilets, sinks, etc.) will be generated from the sewage treatment facility. This appears to be limited to sewage treatment from land-based uses. There is no indication from the EAR whether the estimate considers the marina's usage into the calculations. Thus, this does not take into account the usage estimate of the land-based facilities by the persons using the marina. Also, these impacts should have been considered together with the adverse impacts from discharges of sewage from on-

board vessels at the marina and mooring areas. Although a pump-out service will be encouraged, it is not a guarantee. Also certain vessels have waste treatment capability on-board. Since the applications were separated, these adverse impacts were ignored.

Air Pollution Control

As a direct consequence of separating the permits, the impacts to air quality were not properly reviewed. The land-based development will require disturbance of 4 acres of land. There will be air pollution from dirt, heavy equipment and noxious chemicals emitted from generators. Notwithstanding, these impacts were not fully addressed.

There was no dirt control plan presented or even discussed. There was no discussion of the use of stand-by generators during construction; how many and the expected emissions levels from this type of equipment. There was no discussion on the impact to marine life from the various air pollution sources. There was also no plan proposed to mitigate impacts of the project on air pollution.

Although only submerged land permits require compliance with Virgin Islands Air quality standards, the Committee still has an obligation to consider the cumulative impacts of the land-based development on marine resources and habitat under 12 V.I.C. § 906(b)(1) and (2) and 12 V.I.C. § 903(b)(8). Air pollutants from the land-based operations impact marine life, not to mention public health. By not considering the impacts jointly and requiring more stringent controls, the Committee failed to find that the air pollution sources generated by the project would assure protection of the environment or public health. Thus, the Committee's actions were arbitrary and capricious.

Water Pollution Control

Further, without a cumulative approach, the full extent of degradation to water quality and to critical sea grass habitat could not be known. The land-based operations are not a typical development that can be considered in a vacuum. It includes a marina that by itself creates substantial unavoidable harms. The adverse impacts from the land-based development, includes oil and dirt from impervious spaces, erosion and sedimentation and sewage discharge. These combined with the impact of driving piles to construct a marina and the shading of seagrasses, begin to paint a more realistic picture of the adverse impacts. By separating the permits, the Committee lacked sufficient information to find that areas of dense seagrasses needed to be conserved for their contribution to marine productivity and value as habitat for endangered species and other wildlife. It also created an insufficient basis to find the water quality standards would be met, pursuant to 12 V.I.C. § 903(b)(9) and 12 V.I.C. § 906(b)(2).

If the adverse impacts were considered cumulatively, the Committee would have been able to make a more accurate assessment whether the mitigation measures were feasible and whether they would substantially lessen or eliminate any and all adverse impacts of the project, under 12 V.I.C. § 910(a)(2)(B). The sedimentation controls were inadequate for discharges of sewage, oil and storm water given the nearby gut and the Coral Harbor where the marina impacts would occur. Additional sedimentation controls were necessary, but not required by CZM or the Committee. It was only after significant comments that SEG promised to include additional sedimentation controls. Without amending the application or EAR, this promise was meaningless and certainly could not assure protection of significant marine resources and their habitat.

Thus, by not requiring an EAR that fully discusses the adverse impacts of the land-based and water-based developments and by not requiring SEG to commit to employing more stringent sedimentation control measures, and in light of the cumulative impacts, the Committee granted the Permit without substantial evidence, in violation of pertinent 12 V.I.C. § 903 and 12 V.I.C. § 906 of the CZMA, and acted arbitrarily and capriciously in doing so.

IV. No Adequate Protections for Water Quality

The construction and operation of the land-based development will adversely impact water quality. First, effluent is expected to be used for irrigation. Due to the proximity of the project site to the ghut, that lies between Parcels 13A and 13B, and Coral Harbor, discharges will occur in these areas. In addition, with limited landscaped areas, effluent that is not used for irrigation will be discharged into drain fields. Yet, there was no discussion about requiring SEG to apply for, or at least determine the need for, a Territorial Pollutant Discharge Elimination System Permit (TPDES). The Water Quality Certificate, issued on October 16, 2014 after the Water Permit, required the SEG make the determination, but there was no such requirement by CZM.[3]

The Committee must ensure that the existing water quality standards for all point source discharge activities are stringently enforced and should have required that SEG apply for a TPDES permit or, at least, not make a finding the project complies with the Virgin Islands Water Quality standards without this information. Moreover, there is no mention where the drain fields would be located and how they would designed. This information was needed for the Committee to fully determine the adverse impacts. There was no indication how much landscaped areas

would be used for irrigation and the amount of discharge that would go to the drain fields and their capacity. Without this information, the Committee could not determine if mitigation measures were adequate, and therefore feasible. Since the Committee could not assure the water quality standards would be met by the land-based development, it violated 12 V.I.C. § 903(b)(9), and 12 V.I.C. § 906(b)(2). It also had no substantial evidence to find the water quality standards would be met by the development, and, thus, its actions were arbitrary and capricious.

Second, the adverse impacts from erosion and sedimentation were not discussed, although more than 4 acres of land will be disturbed. Moreover, there was little discussion about the erosion and sedimentation controls that would have been helpful to determine whether they were feasible. There was no plan, diagram or design for placement and sequencing of silt fencing and other controls. Without these details, there was no way for the Committee to know the full adverse impact on water quality and whether the proposed mitigation measures were feasible and would substantially lessen or eliminate any and all impacts.

Third, the pump-out facility for marina operations would be managed on the land-side. A storage facility would also be constructed as part of the land-based development. Due to its proximity to the water, the impacts of spills are a valid concern. Not only was little detail provided regarding the location, management and stability of the pump-out storage facility, no plans or mitigation measures were considered to substantially lessens 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. Without this information, the Committee could not have

[3] 12 V.I.C. § 906(a)(9) requires compliance with all other applicable laws including the Water Pollution Control Act,

determined that water quality standards would be met. Furthermore, SEG stated that the sewage would be trucked to the Virgin Islands Waste Management Authority facility on St. John. Although the Commission was made aware by public comments that the St. John plant cannot handle boat sewage and that it must be shipped to St. Thomas, this issue was not addressed.

Without discussion of the potential adverse impact and without any feasible mitigation measures, the Committee did not have any information to find the mitigation measures are feasible and, even if taken as a whole, would substantially lessen or eliminate any and all adverse impacts of the project, under 12 V.I.C. § 910(a)(2)(B). Thus, the Committee improperly granted the Permit.

V. Restriction on Public Access is Not in the Public Good

The CZMA requires that the Committee, in considering every applicable permit application, ensure that development will not interfere with the public's right of access to the sea where acquired through customary use, legislative authorization or dedication, including without limitation the use of beaches to the landward extent of the shoreline. 12 V.I.C. § 906(c)(6). The public's right of access to the shorelines is granted to the people of the Virgin Islands legislatively through the Open Shorelines Act, 12 V.I.C. § 401 *et seq*. The Act states that no person, firm, corporation, association or other legal entity shall create, erect, maintain, or construct any obstruction, barrier, or restraint of any nature whatsoever upon, across or within the shorelines of the United States Virgin Islands as defined in this section, which would interfere with the right of the public individually and collectively, to use and enjoy any shoreline. 12 V.I.C. § 403. The shorelines of the Virgin Islands is defined as the area along the coastlines

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12 V.I.C. 181 *et seq.*

of the United States Virgin Islands from the seaward line of low tide, running inland a distance of fifty (50) feet; or to the extreme seaward boundary of natural vegetation which spreads continuously inland; or to a natural barrier; whichever is the shortest distance. Whenever the shore is extended into the sea by filling or dredging, the boundary of the shorelines shall remain at the line of vegetation as previously established. 12 V.I.C. § 402(b).

SEG's design plan interferes with the public right to use the shorelines. Not only is there an existing building[4] located within the shorelines, SEG's conceptual design plans includes a new building and a new wastewater treatment within the shorelines. Given the limited coastline in the area of the project, the proposed marina construction, and the extensive upland development, placing additional structures in the coastline illegally restricts access and the right to use and enjoy the coastline. Although this issue was raised in the comments and at the public hearing, the Committee failed to address this restriction on public access, finding instead that the permit would serve the public good and the goals and policies of the CZMA were met. Thus, these findings are contrary to 12 V.I.C. § 906(c)(6), are arbitrary and capricious and are not support by the evidence in the CZM record.

VI. **Lack of Pertinent, Details, Plans and Drawings**

The CZM rules and regulations require that, before an application can be deemed complete, it must contain all documents specified in the application form, contain sufficient information to enable CZM and the Committee to evaluate the application and proof of legal

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[4] The historical photographs and documents for Parcels Nos. 10-17 and 10-18 Estate Carolina show the property was originally submerged land mangroves and had been filled. Although the mangroves were destroyed and the land filled, the land remains filled lands held in trust for the people of the Virgin Islands and is within the definition of the shorelines of the Virgin Islands. It is questionable whether the landowner would have a right to develop that property, without applying for a submerged land permit. If not, SEG was allowed to circumvent the requirements for a submerged land permit, which includes a public interest determination. The Committee granted the Permit without resolving this important issue raised by the CBCC.

interest, including all relevant legal documents. *See* 12 V.I.R.R. § 910-7(a). SEG violated these provision and submitted an EAR that is grossly insufficient and that did not meet the requirements of the CZMA or the CZM rules and regulations. The following items of information were pertinent to the review, but were not including in the EAR or the application.

1. Construction methods proposed;
2. Relevant water quality studies related to ghut that flows through property
3. Fuel Storage and Spill Prevention and Countermeasure Plan for barge operations during construction;
4. Schedule for construction activities and for implementation of sedimentation control devices;
5. Maintenance schedule for sediment and siltation devices on land;
6. A Complete study and analysis of alternatives;
7. Auxiliary generator plans and specifications; and
8. An air quality certificate or plan that addresses emissions particulate matter and other air pollutants.

The application should not have been deemed complete without this information. The Committee clearly did not have sufficient information to evaluate the application. Thus, the Permit should have been denied.

Conclusion

In light of the foregoing, the St. John CZM Committee had, at a minimum, the obligation to make the proper findings under 12 V.I.C. §§ 903 and 906. Instead, the Committee breached its duty by not considering the cumulative impacts; the impacts to water quality; and assuring proper control of sewage, erosion and sedimentation and that the public's right to accesses is not abridged. Given the facts presented above, the St. John CZM Committee had no basis for deeming the SEG land-based application complete or granting the Permit. As a result, Appellant has no choice but to petition the Board to reverse the Decision of the Committee and deny Permit No. CZJ-03-14(L).

LAW OFFICES OF JENNIFER JONES

DATED: November 14, 2014

By: _____

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