

COPY

BEFORE THE VIRGIN ISLANDS BOARD OF LAND USE APPEALS
DISTRICT OF ST. THOMAS AND ST. JOHN

MORAVIAN CHURCH CONFERENCE OF THE
VIRGIN ISLANDS,

Appellant,

vs.

ST. JOHN COASTAL ZONE MANAGEMENT
COMMITTEE,

Appellee.

)
)
) LAND USE APPEAL

) No. _____

PETITION FOR APPEAL

Appeal of the Decision of the St. John Coastal Zone Management Committee rendered on October 10, 2014 in the application of the Summer's End Group, LLC (the "applicant" or "SEG").

NOTICE:

TO: Chairman, Board of Land Use Appeals

The appellant, the Moravian Church Conference of the Virgin Islands, (the "Moravian Church" or "Appellant"), hereby appeals the decisions of the St. John Coastal Zone Management Committee ("CZM") rendered on October 10, 2014, copies of those decisions are attached and made a part of this appeal as EXHIBITS "A" and "B", pursuant to 12 V.I.C. § 914. The Moravian Church challenges the decision of CZM due to numerous errors of law and arbitrary and capricious actions, the effect of which would be to substantially damage the Coastal Zone environment, and to deprive the Moravian Church of its rights, as an historic owner of shoreline

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DEPT. OF JUSTICE

BY: Deryle Charles

DATE: 11/24/14

property abutting Coral Bay, including the right to full and equitable use of its land as a site for a long-planned marina.

STATEMENT OF THE ISSUES PRESENTED

- 1) Whether CZM erred in failing to consolidate CZM Permit Applications CZJ-3-14L and CZJ-4-14W to reflect the mutually dependent and consolidated nature of the applicant's proposed development?
- 2) Whether CZM's failure to find that the applicant's final proposed development incorporates, to the maximum extent feasible, mitigation measures to substantially lessen or eliminate any and all adverse environmental impacts of the development mandates denial of both permits under 12 V.I.C. § 910(a)(2)(B)?
- 3) Whether CZM's failure to make any findings whatsoever mandates the denial of both permit applications under 12 V.I.C. §§ 903(b), 906(a)-(b), 910(a)(2)(A), and 911(c)(1)-(6)?
- 4) Whether, even if CZM had made such findings, CZM's findings were arbitrary and capricious?
 - a. Whether the applicant's evidence of the inclusion of the maximum feasible mitigation measures was sufficient to provide a basis for CZM to find the applicant satisfied 12 V.I.C. § 910(a)(2)(B)?
 - b. Whether the applicant's evidence of funding was sufficient to provide a basis for CZM to find the applicant satisfied 12 V.I.C. §§ 903(b) and 906(a)-(b)?
 - c. Whether the applicant's evidence of the impact of the proposed development on traffic was sufficient to provide a basis for CZM to find the applicant satisfied 12 V.I.C. §§ 903(b)(1)-(2) and (4)-(6) and 906(a)(1)?

- d. Whether the applicant's evidence of the impact of the proposed development on the littoral rights of adjacent property owners, including the Moravian Church, was sufficient to provide a basis for CZM to find the applicant satisfied 12 V.I.C. §§ 903(b)(1)-(2) and (4)-(6) and 906(a)(1)?
- 5) Appellant understands that the transcript is being ordered by a previous appellant in this matter.

ARGUMENT

I. CZM ERRED IN FAILING TO CONSOLIDATE THE APPLICATIONS

The applicant's permit applications, CZJ-3-14(L) ("Land Application") and CZJ-4-14(W) ("Water Application") comprised a unified marina development, involving both the development of submerged lands to create docking slips and moorings as well as the development of the adjacent land to create service facilities for those vessels utilizing those docking slips and moorings, including service facilities for their passengers and crew (e.g. 120 off street parking spaces). As such, both the Land Application and the Water Application, as part of a unified marina development which could only be approved or denied together, should have been subject to both 12 V.I.C. § 910 and 12 V.I.C. § 911.

The viability of each application as a proposed enterprise presupposes the existence of the development sought in the other application. Without docking slips and moorings, land-based service facilities (customs and border protection office, marina office, marina security, crew shower and locker facilities, apartments to support marina management, fueling, solid, hazardous, and liquid waste management, etc.) solely of use to seagoing vessels would be pointless. Likewise, without those land-based service facilities for the potable water, waste, passengers and crew for seagoing vessels, the docking slips and moorings are not viable as a

business enterprise if not environmentally untenable. By failing to consolidate the two permit applications and hold both permit applications to the standards of both of the applicable V.I. Code provisions, CZM erred. In fact, both Environmental Assessment Reports repeatedly note that they are each dependent upon the other development. In its opening sentence, Section 9.0 of the Land Application states explicitly that “this project is entirely dependent on the adjacent marina project.” In light of that fact, all arguments set forth herein regarding the Water Application should be deemed to be equally applicable to the Land Application as both mutually dependent development applications must be denied if either must be denied. Moreover, because CZM failed to treat the applications as consolidated for purposes of its evaluation, that evaluation was legally and substantively improper, and an abuse of discretion.

II. THE ABSENCE OF A FINDING THAT THE PROPOSED DEVELOPMENT INCORPORATED MITIGATION MEASURES TO THE MAXIMUM EXTENT FEASIBLE REQUIRED DENIAL OF THE APPLICATION

Applications for any coastal zone permit, including the permits sought by the applicant in the Land Application and the Water Application, are governed, in part, by 12 V.I.C. § 910(a)(2)(B), which states, in pertinent part, that:

[a] permit shall be granted for a development if the appropriate Committee of the Commission ... finds 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; otherwise the permit application shall be denied. The applicant shall have the burden of proof to demonstrate compliance with these requirements.

In this instance, CZM failed to make any such findings. As CZM did not find that the developments described in the Land Application and in the Water Application as finally proposed incorporated, to the maximum extent feasible, mitigation measures to substantially lessen or eliminate any and all adverse environmental impacts of the development, CZM was statutorily required, as a matter of law, to deny both permit applications under 12 V.I.C. §

910(a)(2)(B). As a result, the absence of such a finding requires the Board to reverse CZM's decision as a matter of law. Moreover, the evidence adduced before CZM would not have sustained such a finding, as it is clear from the record that the applicant did not incorporate the maximum feasible mitigation measures, particularly as the marina and overall development were vastly oversized, and the environmental impact of the proposed development was plainly not scaled to substantially lessen or eliminate all adverse environmental impacts of the development.

III. CZM'S FAILURE TO MAKE ANY FINDINGS MANDATES THE DENIAL OF BOTH PERMIT APPLICATIONS

CZM's failure to make any findings whatsoever required CZM to deny both permit applications for multiple reasons as numerous specific findings are required to grant any major coastal zone permit and any permit for the development of submerged lands.

Applications for any coastal zone permit, including the permits sought by the applicant in the Land Application and the Water Application, are governed, in part, by 12 V.I.C. § 910(a)(2)(A), which states that CZM shall grant a permit if the applicant's proposed development is "consistent with the basic goals, policies and standards provided in sections 903 and 906 of this chapter" before issuing a permit. 12 V.I.C. § 911(c)(1) is even more emphatic, stating, in pertinent part, that CZM:

shall deny an application under section 910 hereof for a coastal zone permit which includes development ... of ... submerged or filled lands, unless it ... makes ... the following finding... that the application is consistent with the basic goals of section 903 and with the policies and standards of section 906 of this chapter.

12 V.I.C. § 903(b), in turn, states that the goals of the United States Virgin Islands with respect to its coastal zones, in pertinent part, are to:

- (1) Protect, maintain, preserve and, where feasible, enhance and restore, the overall quality of the environment in the coastal zone, the natural and man-made resources therein, and the scenic and historic resources of the

coastal zone for the benefit of the residents of and visitors of the United States Virgin Islands;

- (2) Promote economic development and growth in the coastal zone and consider the need for development of greater than territorial concern by managing: (1) the impacts of human activity and (2) the use and development of renewable and nonrenewable resources so as to maintain and enhance the long-term productivity of the coastal environment...
- (4) Assure the orderly, balanced utilization and conservation of the resources of the coastal zone, taking into account the social and economic needs of the residents of the United States Virgin Islands;
- (5) Preserve, protect and maintain the trust lands and other submerged and filled lands of the United States Virgin Islands so as to promote the general welfare of the people of the United States Virgin Islands;
- (6) Preserve what has been a tradition and protect what has become a right of the public by insuring that the public, individually and collectively, has and shall continue to have the right to use and enjoy the shorelines and to maximize public access to and along the shorelines consistent with constitutionally-protected rights of private property owners...
- (8) Conserve ecologically significant resource areas for their contribution to marine productivity and value as wildlife habitats, and preserve the function and integrity of reefs, marine meadows, salt ponds, mangroves and other significant natural areas;
- (9) Maintain or increase coastal water quality through control of erosion, sedimentation, runoff, siltation and sewage discharge...

12 V.I.C. § 906(a), states that the development policies of the United States Virgin

Islands with respect to the first tier of the coastal zone, in pertinent part, are to:

- (1) To guide new development to the maximum extent feasible into locations with, contiguous with, or in close proximity to existing developed sites and into areas with adequate public services and to allow well-planned, self-sufficient development in other suitable areas where it will have no significant adverse effects, individually or cumulative[ly], on coastal zone resources; ...
- (3) To assure that new or expanded public capital improvement projects will be designed to accommodate those needs generated by development or uses permitted consistent with the Coastal Land and Water Use Plan and provisions of this chapter; ...

- (6) To assure that development will be cited [sic] and designed to protect views to and along the sea and scenic coastal areas, to minimize the alteration of natural land forms, and to be visually compatible with the character of surrounding areas;
- (7) To encourage fishing and carefully monitor mariculture and, to the maximum extent feasible, to protect local fishing activities from encroachment by non-related development;
- (8) To assure that dredging or filling of submerged lands is clearly in the public interest; and to ensure that such proposals are consistent with specific marine environment policies contained in this chapter. To those ends, the diking, filling or dredging of coastal waters, salt ponds, lagoons, marshes or estuaries may be permitted in accordance with other applicable provisions of this chapter only where there are no feasible, less environmentally-damaging alternatives and, where feasible, mitigation measures have been provided to minimize adverse environmental effects, and in any event shall be limited to the following: (i) maintenance dredging required for existing navigational channels, vessel berthing and mooring areas; (ii) incidental public service purposes, including but not limited to the burying of cables and pipes, the inspection of piers and the maintenance of existing intake and out-fall lines; [and] (iii) new or expanded port, oil, gas and water transportation, and coastal dependent industrial uses, including commercial fishing facilities, cruise ship facilities, and boating facilities and marinas...;
- (9) To the extent feasible, discourage further growth and development in flood-prone areas and assure that development in these areas is so designed as to minimize risk to life and property; [and]
- (10) To comply with all other applicable laws, rules, regulations, standards and criteria of public agencies.

12 V.I.C. § 906(b), in turn, states that the environmental policies of the United States

Virgin Islands with respect to the first tier of the coastal zone, in pertinent part, are:

- (1) To conserve significant natural areas for their contributions to marine productivity and value as habitats for endangered species and other wildlife;
- (2) To protect complexes of marine resource systems of unique productivity, including reefs, marine meadows, salt ponds, mangroves and other natural systems, and assure that activities in or adjacent to such complexes are designed and carried out so as to minimize adverse effects on marine

productivity, habitat value, storm buffering capabilities, and water quality of the entire complex;

- (3) To consider use impacts on marine life and adjacent and related coastal environment;
- (4) To assure that siting criteria, performance standards, and activity regulations are stringently enforced and upgraded to reflect advances in related technology and knowledge of adverse effects on marine productivity and public health;
- (5) To assure that existing water quality standards for all point source discharge activities are stringently enforced and that the standards are continually upgraded to achieve the highest possible conformance with federally-promulgated water quality criteria;
- (6) To preserve and protect the environments of offshore islands and cays; ...
- (8) To assure the dredging and disposal of dredged material will cause minimal adverse affects [sic] to marine and wildlife habitats and water circulation;
- (9) To assure that development in areas adjacent to environmentally-sensitive habitat areas, especially those of endangered species, significant natural areas, and parks and recreation areas, is sited and designed to prevent impacts which would significantly degrade such areas;
- (10) To assure all of the foregoing, development must be designed so that adverse impacts on marine productivity, habitat value, storm buffering capabilities and water quality are minimized to the greatest feasible extent by careful integration of construction with the site. Significant erosion, sediment transport, land settlement or environmental degradation of the site shall be identified in the environmental assessment report prepared for or used in the review of the development, or described in any other study, report, test results or comparable documents.

The Courts have resolved any question as to whether or not these requirements are mandatory and the degree to which they describe concrete requirements of such permit applications. For instance, in *Environ. Assoc. League of Women v. V.I. Bd. Of Land Use Appeals*, 31 V.I. 9 (Terr. Ct. 1994), the Court stated emphatically that while “the Coastal Zone Management statute does allow for a permit to be issued subject to reasonable terms and

conditions imposed by CZM... an Environmental and Sedimentation Control Plan is not a reasonable condition but appears to be mandated by the goals and policies of the CZM statute and must be an integral part of the [applicant's] application.” *Id.* at 18. In other words, the requirement to satisfy these goals, policies, and standards is not merely an expression of a vague ideal but rather a set of concrete requirements, mandating the inclusion of professional plans and studies to confirm that those goals, policies, and standards have been met at the application stage of the process. CZM’s failure to make any finding with respect to the applicant’s satisfaction of any specific goals, policies, and standards (much less each of those goals, policies, and standards, as required by the statute) required CZM to deny both applications. By the same token, the absence of any one of those findings (much less each of those findings) requires the Board to reverse CZM’s decision as a matter of law.

IV. A FINDING BY CZM THAT ALL OF THE REQUIREMENTS OF 12 V.I.C. §§ 903(a) AND 906(a)-(b) WERE MET WOULD BE ARBITRARY AND CAPRICIOUS

Even if CZM had made findings that each of the requirements of 12 V.I.C. §§ 903(a) and 906(a)-(b) were met (and Appellant contends CZM did not make any findings whatsoever), any such findings would be arbitrary and capricious as they would be insufficiently supported by the evidence. Via submissions and testimony at the hearing, CZM was alerted that the proposed development was opposed by many residents of the U.S. Virgin Islands. That public opposition was not vague, general, conclusory, or unsupported by evidence. On the contrary, it relied upon challenges to specific aspects and provisions of the applications. That public testimony identified the vague, general, conclusory, and unsupported statements found throughout both applications, and the numerous deficiencies in both applications, as well as the numerous

deficiencies in the documents offered in support of those applications¹. No adequate evidence in rebuttal to this overwhelming public testimony was presented by the applicant. Thus, the record provided no basis for a finding to satisfy the requirements of law cited above.

a. A FINDING BY CZM THAT THE APPLICANT MET ITS BURDEN OF PROOF REGARDING MITIGATION MEASURES WOULD BE ARBITRARY AND CAPRICIOUS

12 V.I.C. § 910(a)(2)(B) states explicitly that the applicant shall have the burden of proof to demonstrate 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” and that absent a finding that the applicant has overcome that burden, the permit application must be denied. However, CZM was alerted by extensive public testimony and written submissions to numerous vague, general, conclusory, and unsupported statements throughout both applications on the environmental impact of the development. It was the applicant’s burden to prove that all feasible mitigation measures had been incorporated in the proposed development. CZM did not analyze the application based upon the issues the public comment process revealed and had no evidentiary basis for making a finding that 12 V.I.C. § 910(a)(2)(B) was satisfied. Rather, CZM explicitly declined to address aspects of the applicant’s proposed development that would clearly have an impact on CZM’s specific jurisdictional duty under 12 V.I.C. § 910(a)(2)(B).

¹ The Moravian Church and its tenant also had an experienced environmental consultant, William McComb, review the Applicant’s EAR, and he both appeared to testify at the public hearing and submitted timely and detailed observations on the defects in the Application under the CZM law. (See Copy of his post-hearing written submission attached as Exhibit “C”). CZM did not require the Applicant to respond to these important issues, nor did it make findings adequate to support a decision to dismiss them.

Among the terms and conditions imposed by CZM upon both permits, was a statement that: “[t]his permit does not allow the removal of mangroves, if trimming of mangroves are required the Permittee must obtain a permit from [the] Department of Planning and Natural Resources/Division of Fish and Wildlife.” Sharon Coldren, President of the Coral Bay Community Council, submitted a letter to Jean Pierre Oriol, Director of the Coastal Zone Management Program, on August 4, 2014, in which she noted that, in section 3.0-2 of the application, the applicant appeared to indicate that the planted mangroves would be trimmed as a low hedge.

Under 12 V.I.C. §§ 910(a)(2)(B) and 911(c)(1), CZM may not approve a permit for a development that contemplates the trimming of mangroves without performing its own analysis and making its own findings. Any development that involves an impact upon the “integrity of reefs, marine meadows, salt ponds, mangroves and other significant natural areas” raises a clear question as to whether or not the proposed development satisfies the basic goals of the United States Virgin Islands for its coastal zone, which must be satisfied under 12 V.I.C. § 910(a)(2)(A) and 911(c)(1) or else the application must be denied. Noting the possibility that the applicant’s proposed development might involve the trimming of a mangrove compelled CZM to make its own analysis of whether the proposed development was acceptable based upon CZM’s duty to make a finding that the proposed development is consistent with the goal of “conserv[ing] ecologically significant resource areas for their contribution to marine productivity and value as wildlife habitats, and preserve the function and integrity of ... mangroves and other significant natural areas.” 12 V.I.C. § 903(b)(8). Yet no such analysis was undertaken as confirmed by the record below.

In the same letter, Sharon Coldren also noted that the proposed boating density at the proposed location for the docks as well as the shallow draft would obstruct sunlight for the seagrass bottom, stir up silt to further obstruct sunlight and damage seagrass, coral, and general water quality in an area she noted had been classified as an Essential Fish Habitat by the National Oceanic and Atmospheric Administration. The National Oceanic and Atmospheric Administration, in turn, expressed concerns over the environmental impact of the proposed marina. Actually, the National Oceanic and Atmospheric Administration (“NOAA”) had expressed concerns about proposed plans for an earlier, smaller version of the proposed marina and was no less concerned after the applicant had revised its plans to make the marina *even larger*. In fact, in response to a request from CZM for commentary, the National Oceanic and Atmospheric Administration noted that the new, larger proposed development “result[ed] in greater impact to [the] benthic habitat that is used by sea turtles as well as creating the potential for greater water quality impacts in the bay, which contains habitat for ESA-listed and proposed corals in addition to sea turtles. For this reason [NOAA] continue[s] to have concerns regarding this project.”

Unlike CZM, NOAA listed fifteen different additional pieces of information, studies, data, and surveys that would be required, noting that even with that information once the federal Endangered Species Act consultation began, additional information may also be required. Though CZM shares a virtually identical duty to ensure that proposed developments do not negatively impact the Virgin Islands coastal zone environment, CZM required no additional information, studies, data, or surveys – not even a response to the most fundamental question raised by NOAA: are there feasible alternatives, including on and offsite alternatives and alternatives to a marina? This is virtually the same question CZM is statutorily required to ask

under Virgin Islands law for any development of this kind requiring the dredging of submerged lands, as such developments are only permissible “where there are no feasible, less environmentally-damaging alternatives.” 12 V.I.C. § 906(a)(8). The only alternatives identified by the applicant are the possibility of no development whatsoever and identification of alternative sites that are unavailable or less appealing for a marina of the size proposed.

Inexplicably, there is no alternative presented for a less massive marina or for a development other than a marina, though NOAA specifically indicated it was a question NOAA had posed to the applicant in response to an earlier, smaller version of the proposed development. *See* Page 9-1. Rather than answer that question from NOAA, the applicant proposed an even bigger marina.

At numerous points in the Water Application, the applicant makes statements regarding alleged improvements to be achieved based upon alleged existing negative environmental factors. However, the applicant provides no evidentiary support for the existence of those alleged existing negative environmental factors. By citing potentially non-existent existing negative environmental factors, the applicant describes the proposed development, at times, as actually constituting an environmental mitigation effort, resulting in a net environmental benefit to Coral Bay. For instance, the applicant makes conclusory statements regarding damage to sea grass caused by existing mooring boats and boats routinely utilizing two anchors, causing damage to sea grass. However, in her letter to Director Oriol, Sharon Coldren, President of the Coral Bay Community Council, indicated these conclusory statements were false. CZM required no evidence from the applicant to establish that these alleged negative existing environmental factors actually existed. Moreover, in disregard of its obligation to consider lessening environmental impacts, and considering alternatives, CZM did not require the applicant to address the simple solution of installing a reasonable number of moorings to replace anchors,

without inclusion of a mammoth new marina. Meanwhile, NOAA noted that multiple acres of sea grass would be destroyed by the proposed development, impacting various species that rely upon the sea grass. This mass destruction was simply disregarded by CZM.

The environment is also endangered by the prospect of damage to the proposed marina as a result of tropical storms and hurricanes. Sharon Coldren noted that safety concerns were raised by the placement of the proposed marina, noting the danger to life and property caused by mooring vessels in a location with insufficient protection from storm winds. In fact, she provided photographs of vessels that were apparently thrown onto the land in the area of the proposed development as a result of hurricanes. Obviously, adding the presence of concrete structures in the water in front of that shore increases the likelihood that in such an event the boats would be crushed against the slips and release whatever toxic substances might be contained within them directly into the sea grass as they are broken upon those slips and docks. She also noted that insufficient space was provided for maneuvering vessels of the size proposed by the applicant, increasing the likelihood of collisions and the release of toxic substances as a result of damage to the vessels. However, CZM required no further evidence from the applicant establishing the location was safe for mooring substantial numbers of large yachts, and appears to have simply disregarded this important testimony.

Many members of the public submitted letters emphasizing the exposed nature of the proposed marina location, including members of the public with clearly extensive nautical experience. One commenter had circumnavigated the world on a sailing vessel. Another was licensed to operate 50 ton seagoing vessels. One commenter submitted photographs of another marina on St. Thomas, located in a particularly exposed area, which has apparently been destroyed and repaired so many times after storms that it has been left to disintegrate – an

eyesore for the public. If those people described the proposed location as particularly unsafe and particularly exposed to the elements in a storm and described the size of the proposed marina as unsafe and excessive, CZM had no proper evidentiary basis for simply accepting the applicant's dismissive statement that no marina can be completely protected in a high category storm as sufficient to deem the proposed development to have justified a finding that no feasible alternative exists.

If the applicant claimed that its studies showed that there was minimal exposure to the elements and that the location was particularly protected from the elements, a member of the public submitting photographs of vessels beached in the location of the proposed development more than justified further inquiry on the part of CZM. Whether *any* marina placed in *that* location would be safe in a high category hurricane is irrelevant. Rather, the question is whether *that* location on *that* side of Coral Bay is an appropriate location for a marina of that size at all and whether there are alternative locations that, due to topography and the customary path of winds during a hurricane, would be far better protected than the proposed site. The applicant clearly failed to satisfy its burden of proof with respect to the establishment of mitigation measures and thus any finding by CZM that the applicant had done so would clearly be arbitrary and capricious.²

b. A FINDING BY CZM THAT THE APPLICANT HAD SUFFICIENT
FUNDING WOULD BE ARBITRARY AND CAPRICIOUS

² In the immediate aftermath of the meeting at which 2 of the 3 members of the St. John CZM Committee voted to approve the permit, without any modifications – apparently an unprecedented action – one of the two members explained his vote to the press by stating that he was “keeping his fingers crossed and hoping it works out for the best.” (St. Thomas Source, October 1, 2014.)

Perhaps the most important factor in any major development for purposes of determining whether the development satisfies the goals and policies stated in 12 V.I.C. §§ 903(b) and 906(a)-(b) is the question of whether or not the development will actually be completed as planned or will fail to be completed, resulting in substantial damage to the environment, an eyesore for the public, and damage to the community with no redeeming commercial or public interest purpose – a bridge to nowhere with horrible consequences for the coastal zone of the U.S. Virgin Islands. It is thus particularly shocking that CZM disregarded the warnings of numerous members of the public, who questioned the applicant's ability to complete the project as proposed – the applicant's financial wherewithal to see to completion this massive proposed marina. One member of the committee questioned the applicant at the public hearing as to whether the applicant possessed sufficient financing to complete the development, to which the applicant purportedly responded, simply "yes." Apparently satisfied with this non-evidence of the sufficiency of the applicant's financing, CZM asked no further questions of the applicant on the subject. Given the massive cost for the development identified by the applicant itself, this was inexcusable.

\$35,000,000.00 Projected Cost and Alleged Existing Funding

The applicant's Market Study, Feasibility and Economic Analysis notes that the project is anticipated to cost \$35,000,000.00 (\$22,510,000.00 for CZJ-4-14(W) and \$12,490,000.00 for CZJ-3-14(L)). *See* Funding, Page 1-1. At that point, the applicant proceeds to describe, via a number of conclusory statements, millions of dollars that have purportedly been raised for the project, totaling \$4,900,000.00 with the addition of a U.S. Fish and Wildlife Service Boating Infrastructure Grant of \$1,300,000.00. The applicant concludes: "[t]he St. John Marina is well funded to get through the permitting process." *See Id.* However, no documentation evidencing

\$4,900,000.00 in existing funding is provided as part of the application or supporting documents. Likewise, no documentation of the alleged \$3,600,000.00 in funding, exclusive of the alleged \$1,300,000.00 federal grant, is provided as part of the application or supporting documents.

With respect to the alleged \$1,300,000.00 grant, the applicant provides a letter from the U.S. Department of the Interior, approving a grant award of \$2,673,689.00, of which \$1,273,689 was to come from federal funds. It does not indicate who is to provide the remaining funds or whether they have been provided. However, the letter states explicitly that only \$255,000.00 is authorized to be released to secure permits and to conduct environmental and biological studies to determine impacts. It states specifically that the remaining funds are only to be released upon submission and approval of the required compliance documents. Moreover, the letter states that the grant was for the period of October 1, 2013 to September 30, 2014. In other words, at the time CZM voted to approve the applicant's permits on October 1, 2014, the grant had already expired and the applicant had provided no evidence that the remaining grant funds had been released, that the applicant's compliance documents had been approved, or even that the applicant had submitted its compliance documents at all. The only evidence of funding, other than that letter from the Department of the Interior regarding the release of \$255,000.00 and applicant's mere conclusory statement that the applicant is funded to the tune of \$4,900,000.00, is a single letter. However, that letter provides no evidence of actual funding.

Letter from Anaconda Holdings, LLC

Applicant's sole piece of evidence regarding financing other than the letter from the Department of the Interior is a non-binding letter of intent from an entity from St. Maarten in the Netherland Antilles by the name of "Anaconda Holdings, LLC" dated April 1, 2014. Neither the letter of intent nor the company nor the content of the letter are referenced at any point in the

actual text of the applicant's Market Study, Feasibility and Economic Analysis. Rather, the letter is appended to the end of the report as an apparent afterthought, when the applicant suddenly realized that not a single piece of evidence (sufficient or otherwise) had been provided reflecting financing for those tens of millions of dollars. However, even if that letter had come from a well-known and well-respected bank or financial institution rather than a little-known entity, it would not constitute reliable evidence of sufficient financing for a development projected to cost tens of millions of dollars. A mere "agreement to agree," unenforceable under the law, rather than a formal commitment, as is customarily provided by banks, financial institutions, and insurance companies, is no basis upon which to conclude that an applicant has provided evidence of actual financing, much less evidence of tens of millions of dollars in financing. The text of the letter itself makes clear that it is not an actual commitment ("[b]ased upon a detailed review of The St. John Marina, YCSE due diligence information as well as on site meetings, and upon acceptance and compliance with this letter of intent, we *will* issue a firm funding commitment to The Summer's End Group, LLC..."(emphasis added). However, apparently convinced by the serpentine nature of the financing entity's name or perhaps by Anaconda Holdings, LLC's uncertainty as to whether to refer to itself as "TFG" or "TGF" in its one page letter of intent, CZM asked no further questions on the point, nor was an actual "firm commitment" made a part of the record below.

Letter from Applicant's Marina Designer

In addition to the concerns raised by many members of the public in light of analogous failed developments in the U.S. Virgin Islands and elsewhere as well as an expired grant and the obscure and unenforceable letter of intent as the applicant's sole evidence of financing, CZM had in its possession an August 11, 2014 letter from the primary developer that designed the entire

marina project for the applicants, Applied Technology & Management, Inc. ("ATM"), alerting CZM that the applicant "owes ATM the sum of \$51,803.87 which has been outstanding for well in excess of the thirty (30) days provided for under the Agreement." Moreover, the letter stated explicitly that, pursuant to Articles IV and VII of the Professional Services Agreement dated January 10, 2014 between the applicant and ATM, "[i]n light of [the applicant's] failure to pay, ... [the applicant's] permitted use of ATM Work product including all plans, reports and other materials and work done under the Agreement is hereby revoked [and that] ATM will not represent or appear on behalf of [the applicant] at any public hearings or decision meetings relating to the proposed project."

The applicant responded on August 13, 2014, noting its "cash flow situation" and assuring CZM that it was "taking steps to obtain funds to pay the outstanding invoice amount to ATM." The applicant assured CZM that there was a seven day period to cure before terminating or suspending service by ATM and that the breach would be cured within that time. Likewise, with respect to the revocation of their right to use ATM's plans, reports, and other materials, the applicant assured CZM that the contract was silent as to ownership of documents, drawings, plans, reports or other materials created by ATM.

However, on August 15, 2011, ATM replied (to a letter apparently sent by the applicant's attorney in response to ATM's earlier August 11, 2011 letter), noting that under the contract, the right to terminate upon applicant's breach is not contingent upon a seven day period to cure and is effective regardless of the applicant's payment of the funds owed within that seven day period. In short, ATM specifically stated that it was demanding payment of all sums owed (including interest) and that it was not withdrawing its termination of the contract and revocation of the right to utilize its plans and work product even if paid within seven days.

The record below reveals no inquiry by CZM regarding this situation, though it goes to the heart of the question of whether or not the applicant is capable of completing the proposed development. It must be remembered that though the applicant assured CZM that the Professional Services Agreement between the applicant and ATM was allegedly silent as to ownership of documents, drawings, plans, reports or other materials created by ATM, the Professional Services Agreement is not part of the application and was apparently never provided to CZM. As a result, CZM had no evidentiary basis for accepting that unsupported, conclusory statement from the applicant as true in the face of an express statement from the actual contractor that any right to use its plans and work product had been revoked. Rather, CZM was faced with a record that suggested great uncertainty as to whether the applicant had the right to use those plans at all, yet it failed to make any findings on this crucial point.

Even assuming the applicant's actual statement to be absolutely true ("the contract is silent as to ownership of documents, drawings, plans, reports or other materials created by ATM"), this does not represent even a claim that the applicant continues to have the right to utilize those documents and materials. Rather, it describes the potential subject matter for future litigation between the applicant and its primary contractor to determine whether or not the alleged silence of the Professional Services Agreement regarding ownership of the documents, drawings, plans, reports or other materials created by ATM results in the applicant being permitted to utilize those documents, drawings, plans, reports or other materials to proceed with the proposed development. In fact, though ATM's original August 11, 2014 letter was addressed to the applicant itself, judging by ATM's August 15, 2014 follow up letter, it is sent in reply to a letter not from the applicant but rather from the applicant's attorney and immediately proceeds to cite specific contract provisions in response to whatever legal argument was presented by the

applicant's attorney. In short, CZM was on notice on or about August 15, 2011 that the applicant itself was already contemplating the possible need for litigation with its primary contractor simply to establish its right to utilize those plans as the basis for the proposed development.

If, as the applicant's primary contractor stated to CZM, the applicant no longer has permission to utilize the plans, reports and other material and work done under the Professional Services Agreement, the fact that ATM's name appears as the "prime" designer on each and every drawing and plan for the proposed development potentially means that CZM may not reasonably consider those reports and plans in its analysis of the applicant's application. *See e.g.* C001, C100, C200, C201, C202, C203, C204, C205, C206, C210, C400, C500, C501, C502, C510, Sheet No. 01, Sheet No. 02, Sheet No. 03, Sheet No. 04, Sheet No. 05, Sheet No. 06, Sheet No. 07, Sheet No. 08, and Sheet No. 09. Moreover, ATM is the only part of the applicant's design group that actually has any experience with respect to designing or implementing marinas.

44 of the 66 page qualifications portion of the applicant's package is dedicated to the experience and qualifications of ATM. The few remaining pages are dedicated to Bioimpact, Inc., which is offered as an expert in preparing environmental assessment reports, and Cairone & Kaupp, Inc., a landscape architecture and civil engineering firm. However, neither Bioimpact, Inc. nor Cairone & Kaupp, Inc. offer themselves as qualified to design or implement a marina. At no point in either company description is any reference made to design work or implementation work for a marina. Bioimpact, Inc.'s expertise may be relevant to the question of the environmental impact of the applicant's proposed development and Cairone & Kaupp, Inc.'s expertise may be relevant to the development of portions of the development located on the land, but neither entity is qualified to offer designs for the creation or implementation of a

marina. In other words, without ATM, not only are there literally no plans for the marina in the application, but there is also no entity involved in the applicant's proposed development with any relevant experience with respect to designing or implementing marinas. If the applicant no longer has the right to use ATM's plans and work product, the applicant stands before CZM with literally no plans for the proposed marina and no expertise or experience in designing a marina. However, CZM disregarded this fact, and the fact that this applicant would have to obtain new plans for its marina as well as retain a new entity to provide the actual knowledge or expertise required to design or implement a marina.

In doing so, CZM also disregarded this clear sign indicating that this applicant lacks the financial wherewithal to complete this massive proposed development, which will require, by the applicant's own estimate, thirty-five million dollars. This applicant, knowing that losing the services of its primary contractor and marina designer could impact the applicant's ability to effectively present its permit application in the public hearing before CZM, is in such financial straits that it simply could not pay that key, indispensable contractor \$51,803.87 to avoid breaching that contract as the public hearing was looming. Though the amount of arrearage was only approximately 1/700th of the \$35,000,000.00 proposed cost of the development, the applicant's inability to cover that tiny fraction of the projected total cost of the development at a critical point in the permitting process apparently caused CZM no concern, and CZM required no further evidence that the applicant was in a financial position to complete the proposed development. Though the applicant assured CZM in its Market Study, Feasibility and Economic Analysis that "[t]he St. John Marina is well funded to get through the permitting process," this was clearly not true as the applicant stood at the public hearing without the assistance of its primary developer, without the permission of that primary developer to utilize its plans and work

product, and thus incapable of answering technical questions only the marina designer could answer.

c. A FINDING BY CZM THAT THE APPLICANT'S DEVELOPMENT
WOULD NOT SUBSTANTIALLY AND NEGATIVELY IMPACT
TRAFFIC WOULD BE ARBITRARY AND CAPRICIOUS

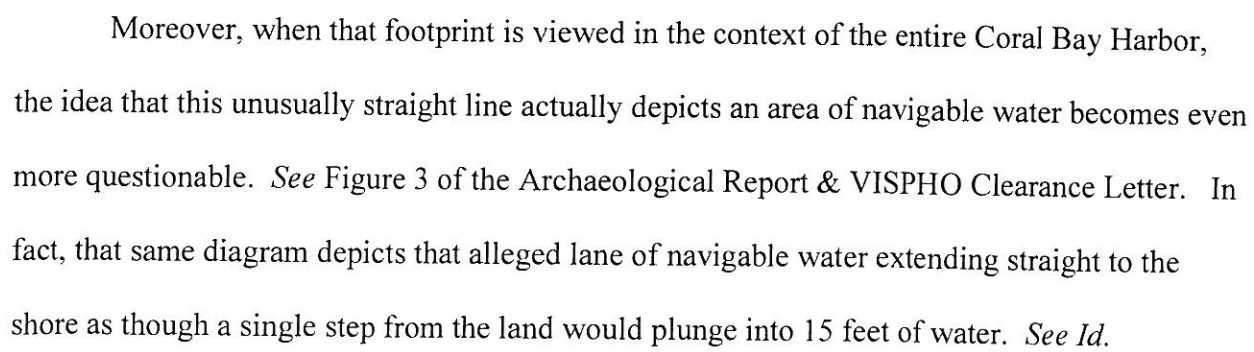
On July 31, 2014 the Commissioner of Public Works sent a letter to CZM refusing to give approval for the proposed development pending approval of the driveway permit for the applicant's proposed 120 off street parking spaces in light of the impact upon access to the public infrastructure and the volume of increased traffic to the adjacent federal route. Though no additional information, studies, or evidence was provided, the Commissioner of Public Works reversed course in less than a month, granting "tentative approval" pending issuance of the road permit. Though CZM clearly recognized that the road access to Coral Bay was limited, justifying CZM's requirement that the applicant provide shuttle service for construction workers, CZM ignored the impact to vehicular traffic that would be caused by adding 120 off road parking spaces to that same area as contemplated in the applicant's development. Moreover, CZM failed to acknowledge the fact that "tentative approval" from a political appointee may not be utilized to satisfy the applicant's duty to present an actual road permit to CZM.

Moreover, though the applicant included a Traffic Impact Study, it is limited solely to vehicular traffic on the public roads. It makes no mention and does not attempt to make any representations regarding the impact of the proposed development on traffic within the waters of Coral Bay Harbor. In as much as the development is, first and foremost, a marina, the omission of any study or report regarding the impact of the proposed development upon traffic in Coral Bay Harbor represents a glaring omission on the part of the applicant, which implicates not only issues of the impact upon the public and the use of the Harbor by other members of the public

but also impacts the environmental impact of the proposed development on the flora and fauna residing in and dependent upon Coral Bay Harbor.

Though the application describes the length of slips and the length of boats and yachts that can be accommodated by the respective slips, the application at no point describes what depth of water is required for any of these vessels – not even for these “mega yachts” of anywhere from 121 to 225 feet in length. Likewise, the application provides no information regarding the amount of space required to maneuver these massive vessels into the proposed slips. However, the diagram depicts a footprint for the marina that stretches deep into and over the navigable waters of Coral Bay Harbor.

Though the applicant provides CZM with a diagram of its proposed development that depicts a series of straight lines to the east, which the applicant has entitled “nav. channel,” the applicant has provided no actual evidence that the area of water covered by that unusually straight line is actually navigable. *See e.g.* Sheet 04 of the USACE Permit Drawings.



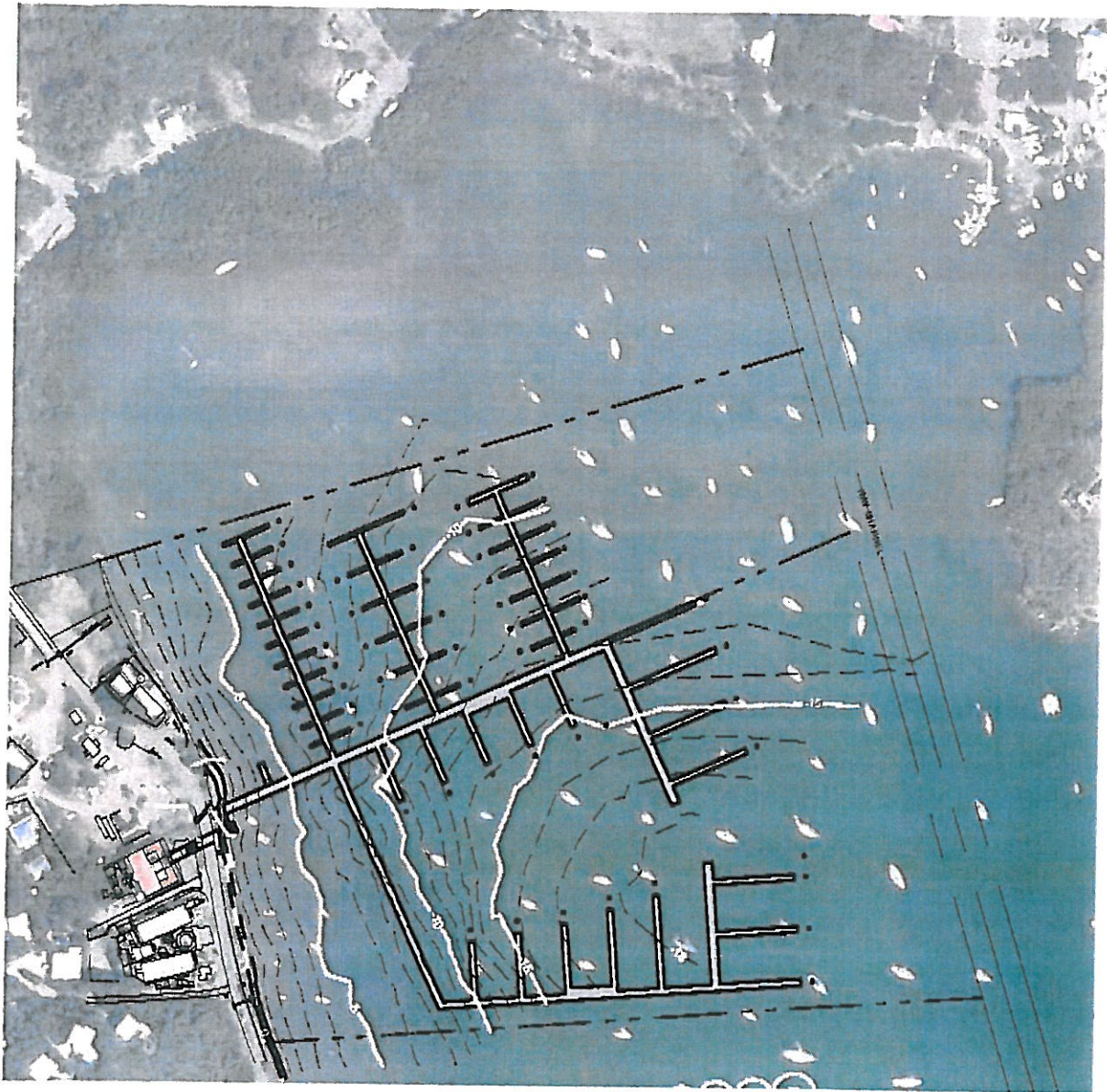


Meanwhile, when the depth of water beneath the proposed development is depicted, it is clear that the depth of water is not found in straight lines but varies considerably along the coast. See Sheet 02 of the USACE Permit Drawings.



Notably, no evidence was offered that the supposed “nav channel” was actually a recognized or approved navigation channel, so designated by any agency with regulatory authority to do so. In fact, the reasonable inference is that the actual, usable and used portion of the bay that functions as a primary navigation channel is far closer to the applicant’s shoreline than this, and that placing an imaginary “nav channel” where it suited the applicant to site that crucial water passage, was no more than a self-serving deception.

In fact, Exhibit A to the applicant’s legal counsel’s August 11, 2014 letter to CZM, which is clearly based on Sheet 02, shows that for littoral owners to the north of the proposed development, waters of 10 feet in depth end within the footprint of the proposed development and then can only be found further to the northeast. Similarly, waters of 15 feet in depth appear within the footprint of the proposed development end long before reaching the littoral owners to the north of the proposed development.



CZM took no interest in validating the suspiciously straight and undocumented “nav. channel” that lead straight to the coast and the impact designating that area as the navigable channel for the entire Coral Bay Harbor would have on traffic for vessels travelling in Coral Bay Harbor or on the sea grass and other flora and fauna within that narrow “nav. channel.” Any finding that the proposed development would not have a negative impact upon traffic among vessels traveling in Coral Bay Harbor (and upon the sea grass and other flora and fauna within

the “nav. channel”) would be based upon no evidence whatsoever and thus would be clearly arbitrary and capricious.

d. A FINDING BY CZM THAT THE APPLICANT WAS NOT
ENCROACHING UPON THE LITTORAL RIGHTS OF ADJACENT
PROPERTY OWNERS WOULD BE ARBITRARY AND CAPRICIOUS

Perhaps the most striking example of CZM’s error was its failure to even address the littoral rights of neighboring property owners, which implicates multiple goals and principles adopted for the U.S. Virgin Islands coastal zone. *See e.g.* 12 V.I.C. §§ 903(b)(4)-(6) and (8). Though the maps of the proposed development clearly stretched out to consume the vast majority of the entire area of navigable water in Coral Bay and though multiple members of the public and owners of littoral land impacted by the development of such a massive marina testified to the excessive size of the proposed marina and its encroachment upon the littoral rights of neighboring property owners, CZM did nothing to address this critical concern.

At the public hearing, and in written submissions, this appellant, the Moravian Church, presented its strong objections to the proposed massive marina, because it was sited and designed to effectively consume all available marina capacity and more, when it was well known that the Church had long been planning a marina development on its property, directly on the opposite side of the Bay.³ The clear impact of the Summers End Marina, if allowed to proceed at its proposed size and scale, was to be the destruction of the Church’s right to proceed with its own marina plans. This was documented not only in testimony, but in a graphic presented by the Church showing the overlap of the applicant’s marina over and into the very area where the

³ The Moravian Church owns property located in the more protected northeast area of Coral Bay Harbor, along the south side of Route 10. The Church and its tenant had been working for some time on the design and development of a marina at the Church’s property, and had already conducted pre-filing meetings with CZM.

Church's marina would be located, effectively leaving no space for the Church's plans.

Specifically, the Moravian Church submitted to CZM legal authority on its rights as a nearby waterfront property owner. It demonstrated that size and scope of the marina development proposed by Summer's End would interfere with the rights of the Moravian Church and, its tenant, T-Rex, to access, and wharf out over, the water adjoining their land. The Church submitted significant legal authority in support of its objections. It said, in part:

"The right of access to the water in front of his land is the fundamental riparian right which the owner of littoral land enjoys."⁴ *Burns v. Forbes*, 412 F.2d 995, 998, 7 V.I. 256 (3d Cir. 1969), citing *Hughes v. Washington*, 389 U.S. 290, 293-294, 88 S. Ct. 438, 19 L. Ed. 2d 530 and 2 Tiffany, Real Property, §§ 659, 660; III American Law of Property § 15.35.

As the owner of littoral land, the Moravian Church "has the right at common law to erect piers and docks on the submerged public land beyond the water line and to wharf out over it, subject to government regulation and control and with due regard to the rights of the public and adjoining land owners." *Burns*, 412 F.2d at 998 (citations omitted). The right of a littoral owner to access waters adjacent to its land "is not lightly to be deprived." *Id.* Development of The St. John Marina by Summer's End, in accordance with the current proposal, would deprive the Moravian Church of its littoral rights by unreasonably restricting the Moravian Church's ability to access the water adjacent to its land and to wharf out over it. See, e.g., *New Jersey v. Delaware*, 552 U.S. 597, 612, 128 S. Ct. 1410, 1421, 170 L. Ed. 2d 315 (2008) ("a riparian landowner ordinarily enjoys the right to build a wharf to access navigable waters far enough to permit the loading and unloading of ships."), citing 1 H. Farnham, Law of Waters and Water Rights § 62, p. 279 (1904) ("The riparian owner is also entitled to have his contact with the water remain intact. This is what is known as the right of access, and includes the right to erect wharves to reach the navigable portion of the stream."); *id.*, § 111, p. 520 ("A wharf is a structure on the margin of navigable water, alongside of which vessels are brought for the sake of being conveniently loaded or unloaded.").

Furthermore, the size of the marina proposed by Summer's End must be sufficiently controlled such that a channel exists for the navigation of vessels

⁴ "A littoral landowner is one whose land borders an ocean, sea, or lake." *Club Comanche, Inc. v. Gov't of the V.I.*, 278 F.3d 250, 261 n.1 (3d Cir. 2002), citing *Alexander Hamilton Life Ins. v. Gov't of the V.I.*, 757 F.2d 534, 538 (3d Cir. 1985). A riparian landowner is one whose land borders a river or stream. "Generally speaking, the special property rights of littoral and riparian owners are the same, and cases dealing with one type of waterfront landowner are freely applied when adjudicating the rights of the other." *Alexander Hamilton Life Ins.*, 757 F.2d at 538 n.5.

between the proposed Summer's End marina and the marina development planned by the Moravian Church and T-Rex. *United States v. Willow River Power Co.*, 324 U.S. 499, 504-05, 65 S. Ct. 761, 765, 89 L. Ed. 1101 (1945) ("The fundamental principle of this system is that each riparian proprietor has an equal right to make a reasonable use of the waters of the stream, subject to the equal right of the other riparian proprietors likewise to make a reasonable use.") (internal citation and quotation marks omitted).

In addition to the factual submissions and legal argument regarding littoral rights raised by Attorney Maria Hodge on behalf of the Moravian Church both at the public hearing and via a letter to CZM, on August 28, 2014, David Silverman of the Coral Bay Community Council submitted a thoroughly researched and well supported report to CZM regarding the subject. He noted one of the factors for a regulatory body to consider in addressing littoral rights is the equitable access to the line of deep water. He cited a publication from the Florida Department of State, entitled Guidelines for Allocation of Riparian Rights, 2013, with a sample diagram depicting an equitable distribution of such rights. He then provided a diagram applying that equitable distribution pattern to Coral Bay based upon the location of the boundaries of littoral owners along Coral Bay.

In a letter to CZM from the applicant's legal counsel, Attorney John Benham, the arguments regarding littoral rights raised by Attorney Maria Hodge were dismissed out of hand by the applicant's legal counsel, who cited a drawing clearly based upon Figure 3 mentioned above, with a similar straight line depiction of navigable waters stretching from the open ocean straight to the land. However, as noted before, that same drawing included the far more variable and natural water depth markings depicting the depths of 5 feet, 10 feet, and 15 feet within Coral Bay Harbor, though stopping short of depicting the depth of water throughout the straight line "nav. channel" depicted in the drawing. The drawing makes clear that adjacent littoral property owners to the northeast will be limited to waters of substantially less than 10' in depth before

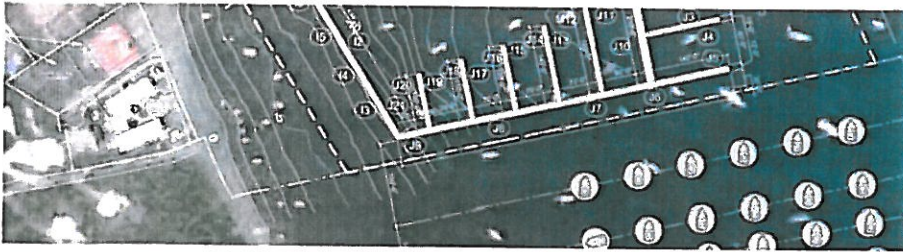
running into the footprint of the applicant's proposed development. The only way those littoral property owners can even reach navigable waters (assuming the suspiciously straight "nav. channel" accurately depicts navigable waters stretching all the way to the shore) is by crossing through the area of navigable water utilized by property owners further to the east.

The applicant's counsel was also dismissive of making reference to riparian rights with regard to the littoral rights of coastal property owners. In reality, as noted above, "riparian rights" is a term that is also used with respect to the rights of littoral property owners. They deal with the equitable distribution of the access and use of navigable waters amongst riparian and littoral property owners. As dismissive as the applicant may have been regarding the "riparian rights" of adjacent property owners, including the Moravian Church, it should be noted that the unusually shaped footprint depicted for the applicant's proposed development was not coincidental and was, in fact, based upon a disfavored approach to resolving riparian rights in situations involving a cove or bay.

The applicant took the northernmost boundary line of the northernmost of his parcels and extended that boundary in a straight line (as far as he chose to go) into Coral Bay Harbor, apparently claiming that as his littoral right. That Parcel, Parcel 10-17, while not labeled as Parcel 10-17, is visible on the coast as a continuation of the northern boundary of the footprint of the proposed marina in several of the applicant's surveys. *See e.g. Figure 3 of the Archaeological Report & VISPHO Clearance Letter.*



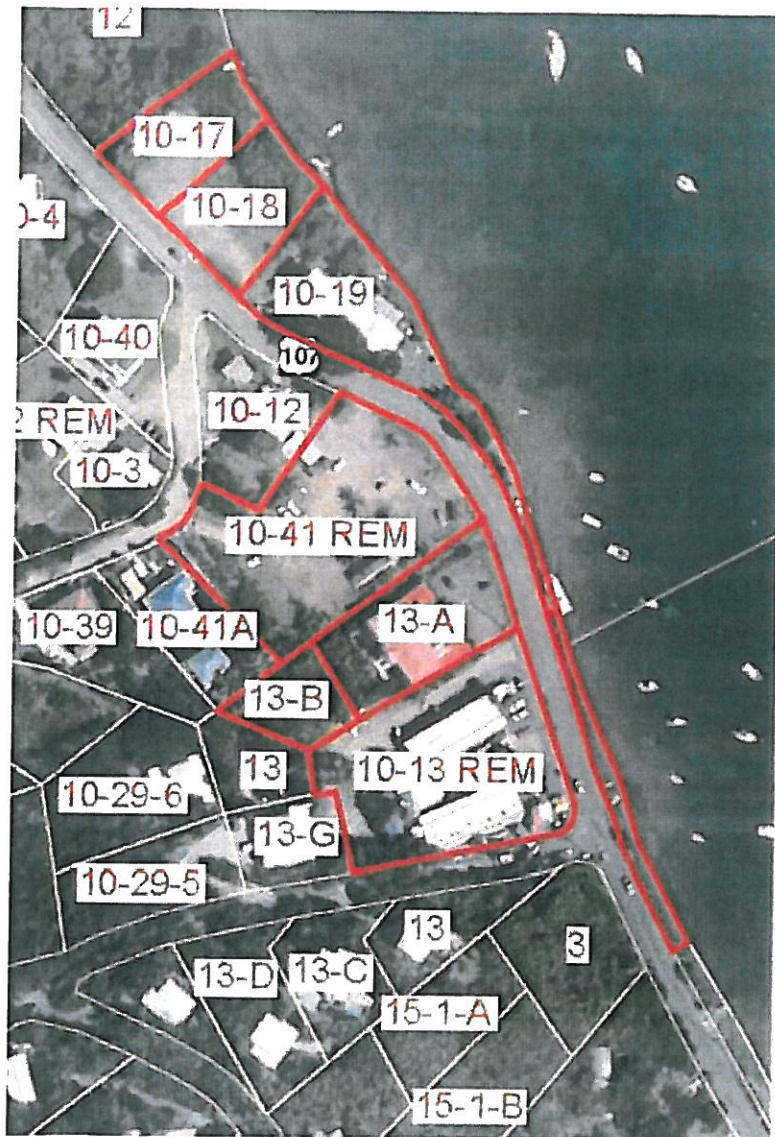
Similarly, the applicant took the southernmost boundary of his southernmost parcel and extended that boundary in a straight line (as far as he chose to go) into Coral Bay Harbor. Unlike for the northern boundary, depictions of the footprint of the proposed marina do not depict the basis for that southern boundary on the coast.



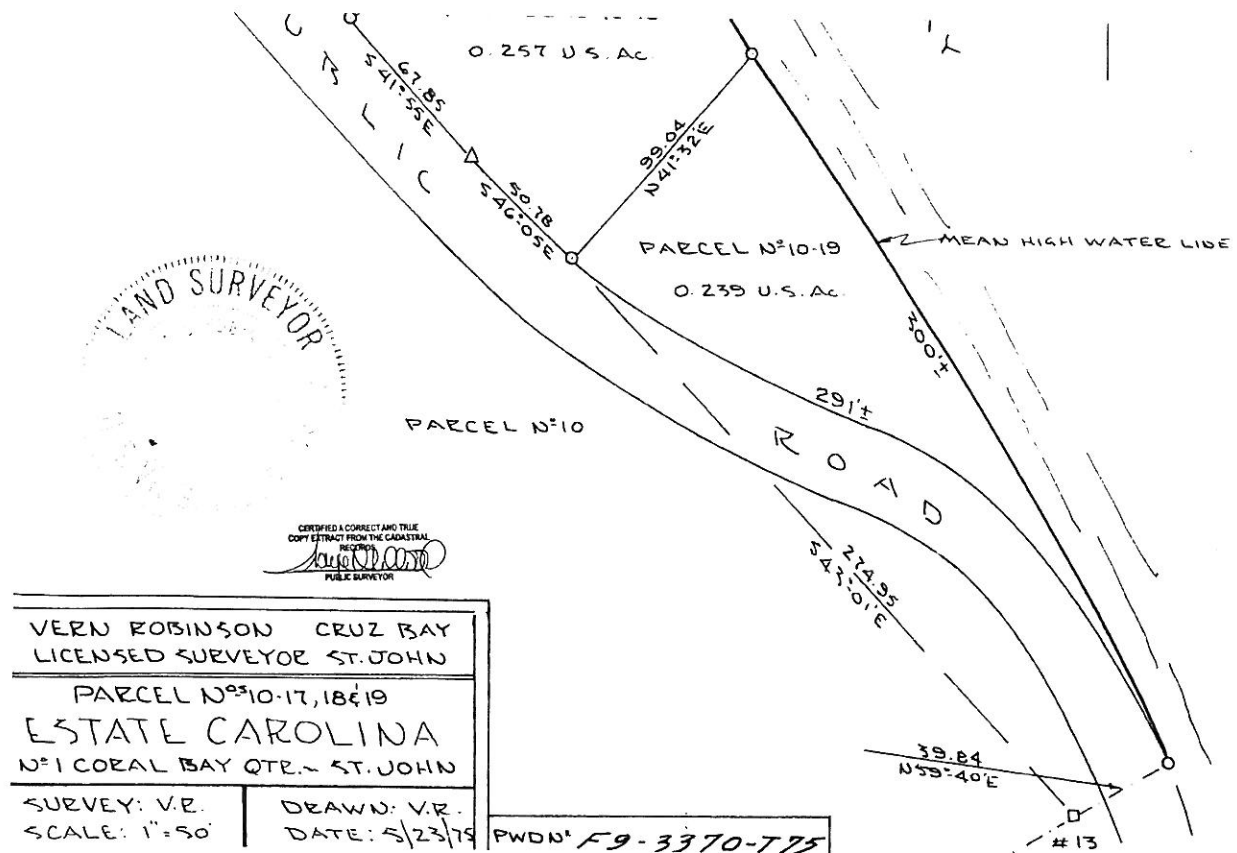
This approach of extending boundary lines straight into the water has only been approved in situations in which the adjacent properties are all along a relatively straight shoreline and in which the boundaries themselves are at approximately right angles to the shore. This approach is disfavored in cases involving a concave cove or bay and in which the property boundaries are not approximately right angles to the shore. In this case, the shoreline is a relatively narrow bay or cove and concave in shape rather than straight. Likewise, even if the shoreline was perfectly straight, and it clearly isn't, the boundary lines utilized by the applicant are not in a right angle to the coast, resulting in the strange trapezoidal shape of the proposed development.

Most troubling of all, is the fact that the southernmost boundary of the footprint of the proposed development does not actually extend from the southernmost boundary of the applicant's southernmost parcel. As noted before, while surveys of the footprint of the proposed marina clearly indicate the basis for the applicant's northern boundary for the proposed marina footprint, those surveys do not indicate the basis for the applicant's southern boundary for the proposed marina footprint. In reality, the basis for that southern boundary is Parcel 10-19 as depicted with a red highlight (applied by the applicant or its contractor) in the applicant's Adjacent Property Owner Key Map, which depicts Parcel 10-19 as featuring a strange tail

extending along the coast of Coral Bay Harbor for approximately 400 feet, past Parcel 10-41 Rem., past Parcel 13-A, past Parcel 10-13 Rem., and even past Parcel 3, which is not among the parcels the applicant owns or controls.

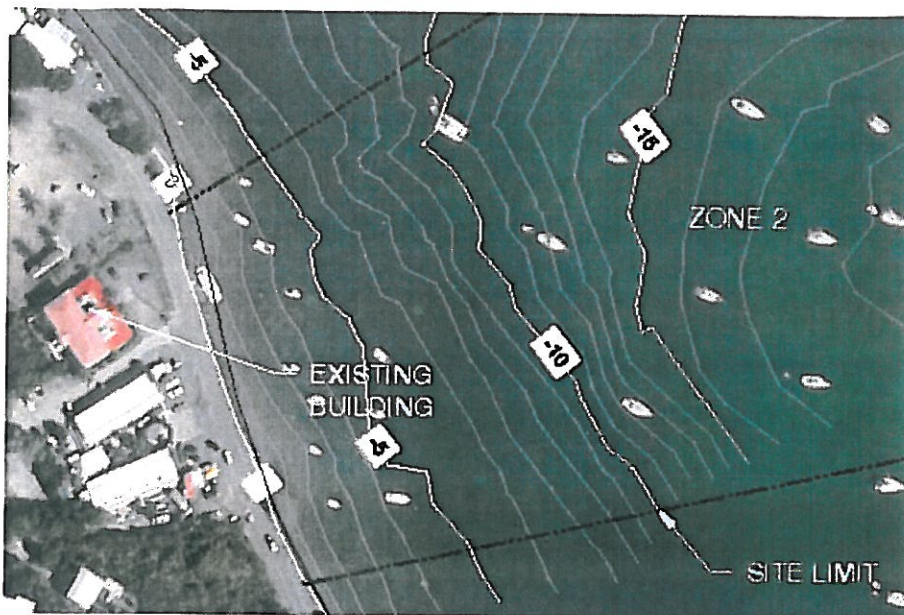


From the end of that strange tail, the applicant produces the southern boundary of the footprint of the proposed development deep into Coral Bay. However, the actual Public Works Map submitted by the applicant itself for Parcel 10-19 clearly depicts the parcel ending at the point the road first reaches the Coral Bay coast. *See* F9-3370-T75.

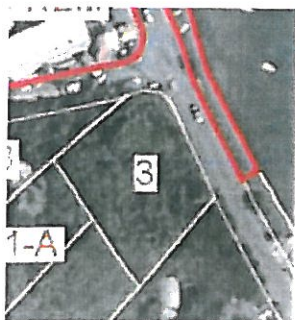


Likewise, the Post-Construction Drainage Area Map submitted by the applicant itself depicts that parcel ending at the point the road first reaches the Coral Bay coast. See C701.

In reality, the point at which Parcel 10-19 actually ends is approximately 400 feet north of the point at which the applicant begins drawing the southern boundary of its proposed marina footprint. In other words, the entire area designated "Zone 2" is based upon beginning from a point on the coast that includes hundreds of feet of littoral land that is not owned or controlled by the applicant. See Sheet No. 2.



The Parcel to the south of that strange tail in the Adjacent Property Owner Key Map is not identified by the applicant, though it is required to identify neighboring property owners within 150 feet. However, the northern boundary of that Parcel to the south is depicted in the Adjacent Property Owner Key Map and, utilizing the approach adopted by the applicant, results in a littoral right boundary line for that southern parcel (and for Parcel 3 immediately to the north of it) that proceeds through the center of Zone 2 as depicted in Sheet 02 “Existing Conditions”. Moreover, it makes clear that all of Parcel 3’s littoral rights are completely encroached upon by the proposed marina as the marina footprint completely covers Parcel 3’s access to the coast.



Even if the approach utilized by the applicant were not clearly improper in a concave bay or cove with parcels with boundaries that are not essentially at right angles to the coast, utilizing

a boundary that does not exist and that does not appear in the map of record for that parcel and (if it did) would be hundreds of feet farther to the north of the point the applicant placed it, clearly renders the proposed development an improper and inequitable means of distributing the littoral rights of the various adjacent property owners. Clearly, utilizing this approach to achieving equality or even simple equity in the division of littoral rights in a cove or bay is manifestly improper, and CZM's approval of such an inequitable division of littoral rights is clearly arbitrary and capricious. This is particularly so when CZM made no findings to demonstrate that the rights of neighboring property owners, and particularly the Moravian Church, had been considered, or would not be adversely and unfairly affected by the approval of this massive, and plainly oversized marina. This Board should not countenance the destruction of the historic rights of the Moravian Church to equitable rights as a waterfront property owner, by the summary approval of a vastly over-sized and poorly sited marina in Coral Bay.


CONCLUSION

All decisions of CZM must rest on substantial evidence in the record. *Conservation Society v. Board of Land Use Appeals*, 21 V.I. 516 (1985). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 520 citing *Richardson v. Pearles*, 402 U.S. 389, 401 (1971). An objective review of the record below fails to reveal substantial evidence that the proposed development is consistent with the findings, goals and policies identified by the Coastal Zone Management Act, for all the reasons set forth above. Moreover, the permit would deprive the Moravian Church of its rights as a property owner on the same Bay, by effectively consuming all conceivable capacity for marinas in Coral Bay. Accordingly, the Board should reverse the Committee.

WHEREFORE, the Appellant petitions the Board of Land Use Appeals for a hearing, for a reversal of the Decision of the St. John Coastal Zone Management Committee rendered on October 10, 2014 in the application of the Summer's End Group, LLC (the "applicant") for permit applications CZJ-4-14(W) and CZJ-3-14(L).

Dated: November 24, 2014

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Mark Hodge", written over a horizontal line.

HODGE AND HODGE

By: Mark D. Hodge

And Maria T. Hodge

1340 Taarneberg

Charlotte Amalie, VI 00802

(809)774-6845

*Counsel for Moravian Church Conference
of the Virgin Islands*

MAJOR COASTAL ZONE MANAGEMENT PERMIT NO. CZJ-03-14(L)

1. **AUTHORITY** This permit is issued by the St. Thomas Committee of the Virgin Islands Coastal Zone Management (CZM) Commission and is administered and monitored by the Department of Planning and Natural Resources (the "Department") on behalf of the Coastal Zone Management Commission pursuant to Virgin Islands Code, Title 12, Sections 904, and any other provisions of THE CZM Act. As herein, "**Permitter**" is the **ST. JOHN COMMITTEE OF THE VIRGIN ISLANDS COASTAL ZONE MANAGEMENT COMMISSION** and "**Permittee**" is **THE SUMMER'S END GROUP, LLC**.

2. **SCOPE** This permit allows the redevelopment of seven contiguous properties in Estate Carolina, Coral Bay, St. John (in two phases) for the construction of various supporting facilities for the Coral Bay Marina. Phase 1 will enhance the existing commercial business sites at CoCo Loba, Shoreline Inn and Island Blues and renovate the "Voyages" restaurant building. Phase 1 redevelopment will include the following:
 - 120 off street parking spaces
 - A new 56 seat restaurant
 - Customs and Border Protection office
 - A Marina Office
 - Marina Engineering
 - Marina Security
 - Fish and Farmers Market
 - Crew shower and locker facilities
 - Apartments to support marina management
 - Proper solid, hazardous and liquid waste management
 - Proper storm water management , and
 - Proper fueling.Phase 2 of the development (implemented strictly on demand) will include:
 - Additional retail
 - Restaurant
 - Office space
 - Commercial space and
 - Six short-term rental unitsThe project is located on Parcel Nos. 10-17, 10-18, 10-19, 10-41 Rem., 13A, 13B and 13 Rem. Estate Carolina, St. John, U.S. Virgin Islands.

3. **TERM** This permit is effective upon its signing by the Chairman of the St. John CZM Committee, pursuant to Virgin Islands Code, Title 12, Chapter 21. Authorization for construction under this permit will expire if the Permittee fails to commence work within twelve (12) months from the date this permit becomes effective.

4. DOCUMENTS INCORPORATED BY REFERENCE

- Exhibit A: CZM Permit Application dated April 4, 2014.
Exhibit B: Site Plan and Drawings dated July 11, 2014
Exhibit C: Environmental Assessment Report dated April 4, 2014

5. GENERAL CONDITIONS

- A. Liability The Permittee agrees to assume full and complete responsibility for all liability to any person or persons, including employees, as a result of its control of the area described in Paragraph 2 of this permit, and all improvements thereon (which area and improvements are hereinafter referred to as "the premises"), and to hold the Permitter free and harmless for civil or other liabilities of any kind during the time the Permittee is in control of the premises pursuant to this permit.
- B. Personal Property and Damage All personal property of any kind or description whatsoever located on the premises shall be there at the Permittee's sole risk.
- C. Assignment or Transfer This permit may not be transferred or assigned except as provided in Section 910-15 of the Virgin Islands Rules and regulations.
- D. Permit to be Displayed A placard evidencing the permit shall be posted in a conspicuous place at the project site during the entire work period.
- E. Reliance on Information and Data The Permittee affirms that the information and data which it provided in connection with its permit application are true and accurate, and acknowledges that if subsequent to the effective date of this permit such information and data prove to be false or inaccurate, the permit may be modified, suspended or revoked in whole or in part, and that the Commissioner or the Committee may, in addition, institute appropriate legal action.
- F. Development to be Commenced Any and all development approved by this Coastal Zone Permit shall begin within twelve (12) months from the date this permit becomes effective and shall be continuous until completion. Failure to perform at least fifty (50%) percent of the work within such period and continuously construct thereafter until the completion of construction shall cause the permit to terminate automatically and render it null and void, unless the Permittee requests an extension in writing and demonstrates to the satisfaction of the Committee that good cause exists for granting such extension.
- G. Notification of Completion Upon completion of any activity authorized or

required by this CZM Permit, the Permittee shall promptly so notify the Director of the Division of CZM and where the services of a professional engineer were required in undertaking the activity, a certification of compliance provided by the project engineer that the plans and specifications of the project and all applicable Virgin Islands Code requirements have been met, shall be filed with said Director.

- H. Inspection The Commission, its Committee, the Commissioner or their authorized agents or representatives shall have the power to enter at reasonable times during project working hours upon any lands or waters in the coastal zone for which this Coastal Zone Permit has been issued. The Permittee shall permit such entry for the purpose of inspection and ascertaining compliance with the terms and conditions of said Coastal Zone Permit. The Permittee shall provide access to such records as the Commission, its Committee, or the Commissioner in the performance of it or his duties under the CZM Act may require the Permittee to maintain. Such records may be examined and copies shall be submitted to the Commission, its Committee or the Commissioner upon request.
- I. Conditions of Premises The Development authorized by this permit shall be maintained in a safe condition and in accordance with the description, plans, or drawings approved by the Commissioner or by the Committee, and all applicable Virgin Islands Laws.
- J. Public Access to Shoreline The development shall be operated so as to assure optimum public access to the shoreline.
- K. Restoration of Area The Permittee, upon renovation or expiration of the permit, shall upon order of the Committee, or the Commissioner, and in their sole discretion, remove all structures authorized by the permit and restore the area to its original condition, and/or modify such structures or site, and/or comply with any directive of the Committee, or the Commissioner in satisfying the original permit conditions in such time and manner as the Committee, or the Commissioner may direct.
- L. Notices All notices sent or required to be sent hereunder must be by certified mail, return receipt requested. If addressed to the Permittor, same shall be sent to the Commissioner of the Department of Planning and Natural Resources, Cyril E. King Airport, Terminal Building, Second Floor, St. Thomas, Virgin Islands 00802, or to such other place as the Permittor may hereinafter designate. If addressed to the Permittee, same shall be sent to Chaliere Summers 5000 Estate Enighed, Suite 63, St. John, VI 00830 or to such place as the Permittee may hereinafter designate by certified mail, return receipt requested.
- M. Non Waiver One or more waivers by the Permittor of any covenant or

condition of this permit shall not be construed as a waiver of a further breach of the covenant or condition. The consent or approval of the Permittor to or of any acts by either the Permittee requiring the Permittor's consent or approval shall not be construed as approval of any subsequent similar act by the Permittee.

- N. Revocation It is specifically understood that all the foregoing covenants and agreements, as well as other terms and special conditions hereby agreed to by the Permittee, are to be well and faithfully kept by Permittee and that any failure by the Permittee to keep same will result in revocation of this permit.
- O. Other Approval If the development covered under this permit requires separate and distinct approval from the United States Government or the Government of the Virgin Islands, or any agency, department, commission or bureau thereof, then no development or occupancy is allowed under this permit until such permits or approvals have been obtained.
- P. Abandonment If the Permittee abandon, deserts or vacates the premises or discontinues its operation at the premises for a period totaling six (6) consecutive months, the permit will terminate automatically and be rendered null or void.
- Q. Signatures on the Permit Document The Permittee shall sign and return the permit document to the Department within sixty (60) days of receipt thereof. Failure to return the signed permit within the time period specified herein will be considered a rejection of the terms and conditions of the permit and will render the offer of the permit null and void, unless the Permittee requests a written extension and the Department grants the written extension.
- R. Damage and Repair of Premises Described in Paragraph 2 In the event of damage to or destruction of the premises, described in paragraph 2 hereof, repair work may be done only after a request to do so has been submitted in writing to the Department and written permission has been granted by the Department.

6. SPECIAL CONDITIONS


1. *All applicable Territorial and Federal permits or other necessary approvals must be obtained, prior to commencement of development activities.*
2. *The Permittee shall notify the Division of Coastal Zone Management (CZM) two (2) days prior to the commencement of development activities.*

3. *All erosion and sedimentation measures shall be installed prior to the start of construction and fully maintained during all construction activities on the site until completion of this project.*
4. *This permit does not allow the removal of mangroves. If trimming of mangroves are required the Permittee must obtain a permit from Department of Planning and Natural Resources/Division of Fish and Wildlife.*
5. *This permit does not allow any work within territorial waters.*
6. *Debris located along the shoreline of the project site must be removed during and upon completion of the project.*
7. *Construction activities associated with this permit is limited to the hours between 7:00 am to 5:00 pm daily except that on Sundays, construction activities are not permitted.*
8. *Prior to start of work, Permittee shall submit to CZM a performance bond in the amount of 20 percent, up to \$5M, of the estimated construction cost of the development.*
9. *To reduce vehicular traffic at the project site, and the area required for employee parking during construction, the Permittee shall provide offsite shuttle services for construction workers.*

CZJ-03-14(L)
The Summer's End Group, LLC.
St. Thomas, Virgin Islands

IN TESTIMONY WHEREOF, the parties herein have hereunto set their hands and seals
on the days and years appearing herein below.

ST. JOHN COMMITTEE OF THE VIRGIN ISLANDS CZM COMMISSION
Permittor




Andrew Penn, Sr.
Chairman

10/24/2014

Date

THE SUMMER'S END GROUP, LLC.
Permittee



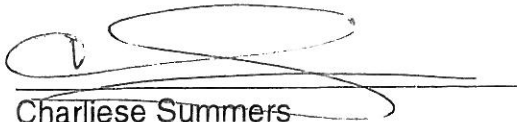
Chaliene Summers
Managing Member

10/24/2014

Date

CZJ-03-14(L)
The Summer's End Group, LLC.
St. Thomas, Virgin Islands

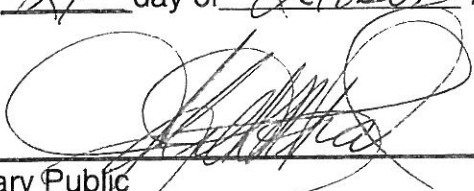
I, Charliee Summers, do hereby certify that as Managing Member of The Summer's End Group, LLC., I am duly authorized and empowered to sign this Permit on behalf of The Summer's End Group, LLC.


Charliee Summers
Managing Member

October 24, 2014
Date

SWORN AND SUBSCRIBED before me

this 24th day of October 2014


Notary Public

Ms. Edith Principal
Notary Public, U.S. Virgin Islands
My commission Expires, June 7, 2016
NP-48-12

MAJOR COASTAL ZONE MANAGEMENT PERMIT NO. CZJ-04-14(W)

1. **AUTHORITY** This permit is issued by the St. Thomas Committee of the Virgin Islands Coastal Zone Management (CZM) Commission and is administered and monitored by the Department of Planning and Natural Resources (the "Department") on behalf of the Coastal Zone Management Commission pursuant to Virgin Islands Code, Title 12, Sections 904, and any other provisions of THE CZM Act. As herein, "**Permitter**" is the **ST. JOHN COMMITTEE OF THE VIRGIN ISLANDS COASTAL ZONE MANAGEMENT COMMISSION** and "**Permittee**" is **THE SUMMER'S END GROUP, LLC**.
2. **SCOPE** (a) This permit allows the construction of a 145 slip marina, a designated mooring field of up to 75 moorings, a pump-out station and a fuel station at and seaward of Plot Nos. 10-17, 10-18, 10-19, 10-41 Rem., 13A, 13B and 13 Rem. Estate Carolina, St. John, U. S. Virgin Islands.

(b) This permit also allows the use and occupancy of the structures described in Section 2 (a) of this permit including 27.5 acres of submerged land areas surrounding the structures described in Section 2, (a) of this permit.
3. **TERM** This permit is effective upon its signing by the Chairman of the St. John Committee of the Virgin Islands CZM Commission, approval by the Governor of the Virgin Islands, and approval by the Legislature of the Virgin Islands. As used herein, the "Effective Date" or "the date hereof" means the date of such approval. This permit will expire twenty (20) years after the Effective Date. This permit is issued for a definite term of 20 years and shall not constitute a property. This Permit shall be renewed only if the requirements of Title 12 of the Virgin Islands Code, Section 911, are met.
4. **DOCUMENTS INCORPORATED BY REFERENCE**

Exhibit A: CZM Permit Application dated April 4, 2014.

Exhibit B: Site Plan and Drawings dated July 11, 2014.

Exhibit C: Environmental Assessment Report dated April 4, 2014.

Exhibit D: Water Quality Certificate dated October 16, 2014
5. **GENERAL CONDITIONS**
 - A. **Liability** The Permittee agrees to assume full and complete responsibility for all liability to any person or persons, including employees, as a result of its control of the area described in Paragraph 2 of this permit, and all improvements thereon (which area and improvements are hereinafter

referred to as "the premises"), and to hold the Permitter free and harmless for civil or other liabilities of any kind during the time the Permittee is in control of the premises pursuant to this permit.

- B. Personal Property and Damage All personal property of any kind or description whatsoever located on the premises shall be there at the Permittee's sole risk.
- C. Assignment or Transfer This permit may not be transferred or assigned except as provided in Section 910-15 of the Virgin Islands Rules and regulations.
- D. Permit to be Displayed A placard evidencing the permit shall be posted in a conspicuous place at the project site during the entire work period.
- E. Reliance on Information and Data The Permittee affirms that the information and data which it provided in connection with its permit application are true and accurate, and acknowledges that if subsequent to the effective date of this permit such information and data prove to be false or inaccurate, the permit may be modified, suspended or revoked in whole or in part, and that the Commissioner or the Committee may, in addition, institute appropriate legal action.
- F. Development to be Commenced Any and all development approved by this Coastal Zone Permit shall begin within twelve (12) months from the date this permit becomes effective and shall be continuous until completion. Failure to perform at least fifty (50%) percent of the work within such period and continuously construct thereafter until the completion of construction shall cause the permit to terminate automatically and render it null and void, unless the Permittee requests an extension in writing and demonstrates to the satisfaction of the Committee that good cause exists for granting such extension.
- G. Notification of Completion Upon completion of any activity authorized or required by this CZM Permit, the Permittee shall promptly so notify the Director of the Division of CZM and where the services of a professional engineer were required in undertaking the activity, a certification of compliance provided by the project engineer that the plans and specifications of the project and all applicable Virgin Islands Code requirements have been met, shall be filed with said Director.
- H. Inspection The Commission, its Committee, the Commissioner or their authorized agents or representatives shall have the power to enter at reasonable times during project working hours upon any lands or waters in the coastal zone for which this Coastal Zone Permit has been issued. The Permittee shall permit such entry for the purpose of inspection and

ascertaining compliance with the terms and conditions of said Coastal Zone Permit. The Permittee shall provide access to such records as the Commission, its Committee, or the Commissioner in the performance of it or his duties under the CZM Act may require the Permittee to maintain. Such records may be examined and copies shall be submitted to the Commission, its Committee or the Commissioner upon request.

- I. Conditions of Premises The Development authorized by this permit shall be maintained in a safe condition and in accordance with the description, plans, or drawings approved by the Commissioner or by the Committee, and all applicable Virgin Islands Laws.
- J. Public Access to Shoreline The development shall be operated so as to assure optimum public access to the shoreline.
- K. Restoration of Area The Permittee, upon renovation or expiration of the permit, shall upon order of the Committee, or the Commissioner, and in their sole discretion, remove all structures authorized by the permit and restore the area to its original condition, and/or modify such structures or site, and/or comply with any directive of the Committee, or the Commissioner in satisfying the original permit conditions in such time and manner as the Committee, or the Commissioner may direct.
- L. Notices All notices sent or required to be sent hereunder must be by certified mail, return receipt requested. If addressed to the Permitter, same shall be sent to the Commissioner of the Department of Planning and Natural Resources, Cyril E. King Airport, Terminal Building, Second Floor, St. Thomas, Virgin Islands 00802, or to such other place as the Permitter may hereinafter designate. If addressed to the Permittee, same shall be sent to Chaliene Summers, Managing Member, The Yacht Club at Summer's End, LLC, 5000 Estate Enighed, Suite 63, St. John, Virgin Islands, 00803, or to such place as the Permittee may hereinafter designate by certified mail, return receipt requested.
- M. Non Waiver One or more waivers by the Permitter of any covenant or condition of this permit shall not be construed as a waiver of a further breach of the covenant or condition. The consent or approval of the Permitter to or of any acts by either the Permittee requiring the Permitter's consent or approval shall not be construed as approval of any subsequent similar act by the Permittee.
- N. Revocation It is specifically understood that all the foregoing covenants and agreements, as well as other terms and special conditions hereby agreed to by the Permittee, are to be well and faithfully kept by Permittee and that any failure by the Permittee to keep same will result in revocation of this permit.

- O. Other Approval If the development covered under this permit requires separate and distinct approval from the United States Government or the Government of the Virgin Islands, or any agency, department, commission or bureau thereof, then no development or occupancy is allowed under this permit until such permits or approvals have been obtained.
- P. Abandonment If the Permittee abandon, deserts or vacates the premises or discontinues its operation at the premises for a period totaling six (6) consecutive months, the permit will terminate automatically and be rendered null or void.
- Q. Signatures on the Permit Document The Permittee shall sign and return the permit document to the Department within sixty (60) days of receipt thereof. Failure to return the signed permit within the time period specified herein will be considered a rejection of the terms and conditions of the permit and will render the offer of the permit null and void, unless the Permittee requests a written extension and the Department grants the written extension.
- R. Damage and Repair of Premises Described in Paragraph 2 In the event of damage to or destruction of the premises, described in paragraph 2 hereof, repair work may be done only after a request to do so has been submitted in writing to the Department and written permission has been granted by the Department.

6. **FEES**

- 1. A rental fee of **One Hundred Ninety Four Thousand, Twenty Six Dollars and Forty Six Cents (\$194,026.46)**, per year shall be charged for the use and occupancy of the submerged land area occupied under this permit. Prior to the completion of construction of the permitted marina described in Section "2" of this permit, the Permittee shall pay an annual rental fee of **Sixty Four Thousand Twenty Seven Dollars and Eight Cents (\$64,027.08)**, per year for the use and occupancy of the submerged lands as described in Section "2" of this permit. The fees are assessed pursuant to 12 VIC §911(f) and have been negotiated with the Permittee pursuant to 12 VIRR §910-5(e). The initial payment under this permit is due upon receipt of the effective permit, and subsequent payments are due on the anniversary of the effective date. Payments are to be made to the Department of Planning and Natural Resources.
- A. The rental fees payable under this permit shall be adjusted at the commencement of the fifth (5th) year of the permit term, in accordance with the increase of the Consumer Price Index as established by the United States Department of Labor, Bureau of Labor Statistics, For "All Items, All urban

Consumers (1984-100 percent)" (the "CPI"), as follows:

- i. The CPI as of the month of the initial term (5th year), and as of the first month of each subsequent year, shall be the base price index and CPI as of the month immediately preceding the first of any year after the initial term shall be the current price index.
- ii. The current price index shall be divided by the base price index and the quotient thereof shall be multiplied by the sum of the annual rent of the prior year.
- iii. The resulting product shall be the annual base rent for the current year.

7. **SPECIAL CONDITIONS**

1. *All applicable Territorial and Federal permits or other necessary approvals must be obtained, prior to commencement of development activities.*
2. *The Permittee shall notify the Division of Coastal Zone Management (CZM) 72 hours prior to the commencement of development activities.*
3. *Turbidity curtains shall be installed at an adequate depth in order to prevent suspended sediment from migrating outside the work area.*
4. *This permit does not allow the removal of mangroves. If trimming of mangroves are required the Permittee must obtain a permit from Department of Planning and Natural Resources/Division of Fish and Wildlife.*
5. *Water quality monitoring shall be as out lined in the Water Quality Monitoring Plan and as approved by the Division of Environmental Protection.*
6. *Permittee shall include language in slip lease agreement mandating the use of pump-out facilities.*
7. *Automatic shut-off nozzles must be used when fueling vessels.*
8. *The Permittee must install signage to inform boaters of the availability and proper usage of pump-out facilities.*
9. *The Permittee shall maintain on site, a log for pump-out activities. The log must be available for inspection by DPNR at all times.*

10. During construction of the permitted development, temporary restroom facilities must be located onsite and available to workers employed for the development.
11. Prior to start of work, Permittee shall submit to CZM, a performance bond in the amount of 20 percent, up to \$5M, of the estimated construction cost of the development.
12. Following the completion of the development, the Permittee shall be required to maintain a bond in the amount of \$2M such that in the event of a default, the Permittee may return the area to its original state.
13. During installation of the pilings, construction activities associated with this phase is limited to the hours between 8:00 am to 4:00 pm daily except that on Sundays, construction activities are not permitted.

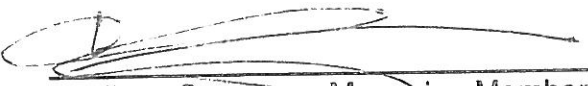
IN TESTIMONY WHEREOF, the parties herein have hereunto set their hands and seals on the days and years appearing herein below.

ST. JOHN COMMITTEE OF THE VIRGIN ISLANDS CZM COMMISSION
Permittor

Andrew Penn, Sr.
Chairman

Date

THE SUMMER'S END GROUP, LLC
Permittee



Chaliene Summers, Managing Member
The Summer's End Group, LLC

10/24/2014

Date

APPROVED
Governor of the Virgin Islands

The Honorable John P. de Jongh, Jr.
Governor

Date

APPROVED
Legislature of the Virgin Islands

The Honorable Shawn Michael Malone
President, 30th Legislature

Date

I, Chaliene Summers, do hereby certify that as Managing Member, The Summer's End Group, LLC, I am duly authorized and empowered to sign this Permit on behalf of the The Summer's End Group, LLC.

Chaliene Summers
Managing Member

October 24, 2014
Date

SWORN AND SUBSCRIBED before me

this 24th day of October 2014

Notary Public

Public Statement for the St. John Marina Water CZM Permit

Good afternoon. My name is William McComb and I am an Environmental Consultant working on a Marina Project in the eastern portion of Coral Bay.

I have reviewed the EAR and Appendix for both the Water and Land CZM Applications and have several observations regarding them.

It is surprising that the St. John Marina was allowed to separate the Project into two separate Permits. Both EARs continually state that each is dependent on the other. In Section 9.0 Alternatives to the Proposed Project of the Land EAR, the opening sentence states that "this project is entirely dependent on the adjacent marina project". The dependency of the Marina on the Upland Project is clear in that the land based development will provide the Marina with; potable water; solid waste disposal; fuel storage; boat pump out storage; electricity; emergency generator service; marina office; restroom facility for Marina users; crew showers and storage lockers; off street park. The Marina cannot operate without these services.

A combined permit is crucial as the upland should not start without the ACOE permit. What happens if they start on the land portion and don't get the ACOE marina permit? Do they walk away from a partially completed project as happened at Pond Bay? They should not be able to start until all permits are in place.

Their Economic Impacts are based on a feasibility model using data from 2006 to 2008, which is pre-recession. But the Model was not included in the Appendix, which is needed to verify their findings. It is entirely possible that the project as proposed is not financially feasible based on changes to the US and worldwide financial situation. CZM should have them prove that the project is financially feasible before approving either Permit by submitting an updated feasibility study based on current boating and financial conditions.

In Section 3 Abstract:

They briefly describe the project. In order to reduce impacts on turtle grass and avoid dredging, they move the slips out into deeper water, basically restricting anyone else from developing any marina activities in Coral Bay and this is further exacerbated by them putting in a large mooring field. There is no mention of how many existing moorings the Marina would force to be moved other than 2 permitted moorings. Where is a commitment letter from Custom and Border Protection stating that they will participate?

The developer states that they hope to revitalize the economy of Coral Bay, but nowhere in the EAR or Appendix is there a Feasibility study that supports the size and economics of the Marina and Upland Project nor that Coral Bay needs to be revitalize with a project of this size.

The Water EAR mentions that the marina will be 145 slips with 12 permanent moorings and will provide 75 moorings in a private/public partnership. There is no mention of who would pay for the relocation of existing moorings, both permitted and non-permitted nor the economic impact on the displaced mooring users.

It is mentioned that they have formed a Marine Users Advisory Panel. Who is on the panel, when and how often had they met and what was the Panel's recommendation. Nothing is presented that the Panel had any input into its size or design.

The economic benefits of the upland development along with the marina is described, but there isn't a study or calculations showing how they arrived at these figures. If it was based on data from 2006 -2008, it is likely that the benefits will be less than stated.

Nowhere does the abstract mentioned what impacts that the St. John Marina will have on the potential for any other shoreline landowners to develop their property. Summer's End principles where aware that the Moravian Church is going to develop its property and a marina. The project as proposed will probably prohibit the Moravian Church from benefiting from the development of its property.

In Section 4.0 Statement of Objectives sought by the Proposed Project

St. John Marina states that its primary objective is to create a premier marina development with associated upland facilities to attract private and charter yachts and establish a properly constructed mooring field. Again, the marina size seems to be based on outdated information and might not be financially feasible as designed. They need to provide an updated study to justify their project and financial benefits.

They state that the St. John Marina is ideally located. That is not necessarily true. There are other areas within Coral Bay that might be better suited and protected.

In Section 5.0 Description of the Project

All through this section in both applications, there are constant references to how the two projects are tied together.

There is nothing presented in either application to support that a project this size is needed in Coral Bay.

It is stated that a mitigation measure for loss seagrasses in the Marina is to have seagrass plugs transplanted to the NW corner of Coral Bay where sediment has been deposited over the years due to uncontrolled Stormwater runoff. Since Stormwater will continue to flow in this area it is highly likely that the plugs will be washed away and/or covered with sediment. In the Benthic Mitigation Plan it is mentioned that Summer's End will undertake improvements. However they have not presented any plan of any improvements. Will Summer's End state that they will pay for the design and implementation? When would this happen?

The EAR mentions that any moorings that will be relocated will be design and installed correctly. However, nowhere do they say they will pay for the relocated moorings.

There is mention of a construction management plan to be followed when construction over sensitive areas is done to minimize site disturbance, but it is not provided.

For potable water supply they state that make up water will be purchased from WAPA and Caneel Bay as needed. However, no letter from WAPA or Caneel Bay is included.

Land EAR Section 5.01e Erosion Sediment Controls: The Marina EAR mentions that there will be extensive impervious parking areas, but this section of the Land EAR does not mention how they will contain oil/sediment runoff from the parking areas.

Land EAR Section 5.01j Method of Sewage Disposal/Pump-out Facilities: The Land EAR states that the total upland development will generate 10,830gal/day of sewage and that disposal of the effluent will be by irrigation and toilet flushing. Assuming that toilet flushing will account for 25% of the effluent that means that the irrigation system will have to dispose of 8,125gals/day.

They have not provided any landscape plan showing what areas will be irrigated and nor how large they will be. Based on the location and existing rainfall, it is reasonable to expect that the irrigation should be 3/4 inches per week or 39"/year. To dispose of 3/4 inches per week, the 8,125 gals/day would need approximately 2.6 acres of land or 80% of the total project acreage. With the buildings, roads, parking, sidewalks etc., there is no way that all of the effluent can be used for irrigation without it running directly into Coral Bay. The Land Development needs to be downsized to balance sewage generation to available land for irrigation. **The correlation of sewage disposal by irrigation and project size is often overlooked by the permitting agencies and can lead to pollution of ground water, surface water and ocean with very little after the fact mitigation measures available short of shutting down the polluting facility.**

In Section 6.0 Ecological Setting & Probable Impact on Natural Environment.

It is stated that rainfall at the east end of St. John is approximately 35" per year with the driest period from January to March, which is the peak season for the Marina and Upland Facilities. Nowhere do they describe how much water will be needed from WAPA and Caneel Bay during this period.

It is stated that the maximum water demand for the Project is 12,000 gals per day, but no calculations are provide. In reviewing the Land EAR, this is the amount for the Upland development. The marina will use an additional 4,500 g/d for a total of 16,500 g/d.

The EAR addresses the overall wave regime around St. John, but no study or report was done to assess wave generation in Coral Bay itself. The western portion of Coral Bay appears to be more exposed than the eastern portion.

It is mentioned that there about 115 boats moored in Coral Bay, but they are only installing 75 public/private moorings. What about the other 40 existing moorings? Nowhere in EAR do they state that they would pay for the 75 properly installed moorings. When will these moorings be installed and what happens to the existing moored boats until the new moorings are in place?

In Section 7.0 Project Impacts

Section 7.03a – Potable Water: It is stated that Caneel Bay can provide up to 90% of the Marina potable water requirements, but they do not include a letter from Caneel Bay stating so. It is stated that the average peak flow would be 4,500 g/d but in season could be as high as 25,000 g/d. Will Caneel Bay supply 90% of this amount or of the 4,500 g/d. In the Land EAR, it

is stated that WAPA and Caneel Bay would supply make up water, but again no letter from WAPA and Caneel Bay on how much and when, prime season or off-season.

Section 7.03b Wastewater: They say that wastewater from the boat pumpout system will be pumped to a 3,000 gal storage tank on the upland project and expect it to be hauled weekly. With a 145 slip marina and 87 moorings that could potentially use this system, is this a reasonable assumption? They give no calculations on how they came up with this amount.

Regarding wastewater from the Land Portion, this has been addressed in Section 5.01j above.

Section 7.03c Solid Waste: The write up for this section in the Land EAR was copied from the Marina EAR and refers to 1.5lbs/~~slip~~/day or an average of 1,500lbs/day. There is no mention of the amount of solid waste that will be generated by the Upland development.

Section 7.03d Traffic: The Traffic Study concludes that there will be minor increase in traffic in front of the Marina, Route 107. However, they did not study the impacts of the increase traffic caused by the Marina and Upland Development on Route 10. In addition what will be the impact on travel from/to Cruz Bay caused by the water trucks, sewage trucks and the delivery of supplies?

Section 7.03e Electricity: It is estimated that the Marina would require 1.5 megs of power. The WAPA Load Requirement Sheet provided to WAPA specifically states it was for the Marina only. There is no calculations on how this load was determined. The write-up for this section in the Land EAR was copied from the Marina EAR. There is no calculations or reference to the electrical requirements for the Upland development. The WAPA Load Calculation Sheet specifically referred to in the Land EAR states it is for the "Marina".

Sections 7.03f to 7.03i (Schools, Fire & Police; and Public Health): These Sections in the Land EAR has been copied directly from the Marina EAR and only refers to the marina and doesn't address impacts that the Upland development might have.

Section 4 Social Impacts: The EAR describe a litany of organizations they support but doesn't say how. They state that depending on EDC benefits they will give \$50,000, but what happens if they don't get the benefits? They have included about every organization on St. John, except the Moravian Church as benefiting from this Project. They don't address the social impact of the change in the character of Coral Bay or with a project this size the potential for a population shift to Coral Bay by workers and the associated impacts on all public services. They are aware of the Moravian Church's plans to develop its property and marina but don't address the combined social impacts.

They talk about all the organizations they will help, but do not mention if they have had any formal meetings in which they presented their plans.

They state that they will assist the Coral Bay Fishermen. Have they formally met with the Coral Bay fishermen? If so, who and do they agree to what St. John Marina will offer. They do not address if they will allow the fishermen to keep their boats at the Marina free of charge or let them process the fish for sale at the marina?

In the Land EAR, this section has been copied directly from the Marina EAR and refers to the marina and doesn't address any impacts that the Upland development might have.

Section 7.5 Economic Impacts: There is extensive discussion about an economic model and study that St. John Marina used to generate the estimates for taxes, income, jobs, etc., but do not include the Model or Study. Without the feasibility/economic study there is no way to determine what benefits are generated by the Marina and what by the Upland. In addition, the model was developed using data from 2006 to 2008 which is pre-recession. They need to update their model and report and revise both the Marina and Upland plans to reflect present economic conditions. As designed now, it is questionable if the project is financially feasible.

What assurance is there that they have the financing available?

Section 7.06 Impacts to Historical & Archaeological Resources: In the Land EAR, this section has been copied directly from the Marina EAR and refers to the Phase I Underwater Survey with no reference to the Upland Phase I. However the Land EAR Appendix does contain the 2005 SHPO sign-off for the Upland development.

Section 7.7 Recreational Use: There is no mention of potential loss of recreational use by the owners of the moorings that will be removed nor by the public that now uses the area of the proposed Marina for recreational purposes. In the Land EAR, this Section has been copied directly from the Marina EAR and doesn't address any impacts that the Upland development might have.

Section 7.10 Marina Security: There is reference to providing space to Customs and Border Protection (CBP), but there is no letter from CBP. With customs clearance in Cruz Bay and the planned clearance in Red Hook, this will not be likely in the near future. They should state that they will provide a dedicated space for DPNR and not just say they will accommodate DPNR.

Section 7.12 Potential Adverse Effects Which Cannot be Avoided: There is no mention of the impacts on Route 10 by the construction equipment and the long term trucking required for the Marina and Upland development. Overall adverse effects can be reduced by reducing the size of the Marina and Upland Development.

In Section 8.0 Mitigation Plans:

One of the key mitigation plans is to improve stormwater runoff into Coral Bay by controlling stormwater in the northwest corner of Coral Bay. This is a complex subject as a Plan has to be developed and all the various landowners have to agree to it. St. John Marina does not control any land in this area nor have they presented any plan for such an improvement nor say they would pay for such a design and construction. No Plan has been submitted and how can this be a mitigation measure without an approved Plan. The lack of any firm plans and timetable for Stormwater runoff control in the northwest corner even raises doubts that one of the proposed Submerge Aquatic Vegetation mitigation measures of moving seagrass to this area will be viable.

A Letter of Intent between Summer's End and DPNR states that the parties where to enter into an Agreement within 90 days of the LOI for the 75 moorings, which was dated March 19th, 2014. Where is the Agreement or have the parties failed to come to an agreement?

One of the mitigation measures stated in the Upland EAR is the use of an advance WWTP with the effluent being used for irrigation. The irrigation area needed is larger than the available land. See comment in Section 5.01j above.

Section 9.0 Alternatives to the Proposed Action:

They describe in detail several criteria that was used in evaluating the preferred location for a marina on St. John. The matrix that was developed shows that Coral Bay was the preferred location. However, they did not address any alternative sites in Coral Bay. If they had used their criteria for Coral Bay, would it have indicated that a site on the east side of Coral Bay would have been a preferred site? This area already services the mooring community and is better protected from wave action in Coral Bay and could service a marina without extensive upland improvements.

In addition, they did not adequately look at the Alternative of a Smaller Project, both Marina and Upland. The Land EAR stated that this is the minimum project area needed to support the existing and new business required to support the Marina. They have provided no report that indicates a smaller marina or Upland Facilities would not be feasible and a preferred alternative. It would have less impact on existing resources.

In Conclusion

Neither the Water nor Land Permit Applications should be approved until the issues raised above are adequately addressed. A Marina with associated upland facilities in the west side of Coral Bay could be created, but its size and supporting services need to be addressed more closely than what has been presented by the proposed St. John Marina.