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August 15, 2019

Via e-mail: emorris@legvi.org

Ernest E. Morris Jr., Esq.
Chief Legal Counsel
Legislature of the Virgin Islands
56-56A King Street
Christiansted
St. Croix, U.S. Virgin Islands 00840

Re: Coastal Zone Management Permit No. CZJ-04-14(W)
Submerged lands lease
Our file: 25050.00

Dear Attorney Morris:

This office, in cooperation with the St. Thomas law firms of Moore, Dodson & Russell, P.C. and The Cattie Law Firm, P.C., represents The Summer's End Group, LLC ("Summer's End"). We have been provided with a copy of a letter date August 9, 2019 from Hon. Novelle E. Francis, Jr. as Senate President, to Chaliene Summers, as Managing Member of Summer's End. The letter conveys the distressing news that the Legislature is again delaying action relating to Major Coastal Zone Permit No. CZJ-04-14(W) (the "Permit"). A copy of that letter is attached for your reference.

This letter addresses the concerns raised in the Senate President's letter, and related questions that we understand have arisen. There is no legal issue precluding the Legislature from proceeding to ratify the Permit.

The development of a world-class marina in Coral Bay, St. John is the subject of the permit. There is no marina on St. John, or for that matter, any dockage available to the public, and the project will fill that void. It will provide a much-needed economic stimulus to the territory in general, and St. John in particular. Having failed in every previous public hearing, the very vocal opponents of the project have now launched a barrage of correspondence and misinformation at the Legislature in their misguided efforts to delay or derail the project. In effect, these opponents of the project are trying to manipulate the Legislature to subvert the permitting process of the Virgin Islands Coastal Zone Management Act ("CZM Act").

Those persons opposing the Summer's End project have previously exercised their rights to voice their opposition during the permit application process before the Coastal Zone Committee, the Board of Land Use Appeals, and the Superior Court. However, these opponents fail to acknowledge the reality that every time the merits of the project have been considered; the development has been approved. The St. John Coastal Zone Committee approved the Summer's End permit applications in October 2014, after completion of the full public hearing process mandated by the CZM Act.

Thereafter the opponents of the project pursued an appeal of the issuance of both the land and water permits to the Board of Land Use Appeals ("BLUA"). The BLUA considered all the materials in the administrative record and on June 6, 2016 affirmed the issuance of both the water and land permits, after explicitly finding that the CZM Committee had made all the required legal findings. A copy of the BLUA decision is attached.

The BLUA decision also consolidated the land and water permits for the development, an action in which Summer's End agreed. This consolidation is within the authority granted the BLUA by the governing statute, which states:

(d) Actions of the Board. The Board, by majority vote of its authorized members, shall either affirm or reverse the Commission's or its appropriate Committee's or the Commissioner's action and shall either approve or deny an application for a coastal zone permit. If the Board grants an application for a coastal zone permit, the Board shall impose such reasonable terms and conditions on such permit as it deems necessary to

achieve the objectives and purposes of this chapter. The Board shall set forth in writing and in detail the reasons for its decision and findings of fact upon which its decision is based. If the Board reverses a Committee's or the Commissioner's action on a coastal zone permit, it must make all of the findings required by section 910, subsection (a), paragraphs (2), (3) and (4) of this chapter. A copy of the Board's action shall be available for public inspection at the Board's offices during ordinary business hours. The Board's action shall be final after four working days following its decision.

12 V.I.C. § 914(d) (emphasis added). Accordingly, the consolidation of the permits was effective upon the ruling by the BLUA, without any need to remand the permits to the CZM Committee for any additional action. No new "consolidated permit" needs to be issued as the BLUA decision consolidated the permits with no need for additional action by Summer's End or the CZM Committee.

The opponents of the project thereafter filed two actions for writs of review to contest the decision of the BLUA. The two actions were consolidated by the Superior Court, and have been fully briefed since early 2017. Despite repeated entreaties from Summer's End, no decision has been made by the court. No stay of the permit was issued by the Superior Court nor was it ever applied for by the opponents.

The mere pendency of these actions for writ of review do not operate as a stay, as has been confirmed by the Virgin Islands Supreme Court. In the case of *Magens Point Resort Hotel v. Benjamin (Department of Labor)*; 58 V.I. 191; 2009 V.I. Supreme LEXIS 30), the Supreme Court specifically held that the absence of a stay means that the underlying orders and judgment can be enforced while the appeal is pending, stating:

Furthermore, it is well established that, in the absence of a stay, a court order may be executed even if it has been challenged by an appeal to a tribunal that may reverse, vacate, or otherwise modify the order. Citing *In re Federal Facilities Realty Trust*, 227 F.2d 651, 654 (7th Cir. 1955).

58 V.I.at 197-198. In sum, the pendency of the writ of review actions presents no impediment to the Legislature's ratification of the Permit and submerged lands lease.

The Permit before the legislature is in compliance with the Coastal Zone Management Act (CZM Act). The Permit was issued by the St. John Coastal Zone Management Committee and unanimously affirmed by the Virgin Islands Board of Land Use Appeals. As required by the CZM Act, the water permit has been approved by Governor Albert Bryan Jr. and forwarded to the 33rd Legislature to be ratified. The Coastal Zone Management Act requires the Legislature to act on the permits upon these approvals. Despite the delays in the process the Permit is not expired (a concern expressed by some persons). Instead, the Permit term has not yet begun, as paragraph 3 of the Permit states:

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" of "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 [word missing]. This Permit shall be renewed only if the requirements of Title 12 of the Virgin Islands Code, Section 911, are met. [*Italics added.*]

The single item up for the Legislature's consideration is the submerged lands lease portion of the water permit, pursuant to Title 12 Virgin Islands Code section 911(e). As stated, this has already been approved by the Governor and awaits only ratification by the Legislature. It should be noted that, even after the Legislature's ratification, Summer's End cannot immediately commence development of the marina, as section 911(e) states:

The Governor's approval of any such permit or lease must be ratified by the Legislature of the United States Virgin Islands. Upon approval and ratification of such permit, occupancy and any development proposed in connection therewith shall not commence until the permittee has complied with the requirements of the

United States Army Corps of Engineers pursuant to Title 33 of the United States Code.

Summer's End continues to diligently pursue the United States Army Corps of Engineers ("USACE") permitting process. In addition to the St. Thomas counsel, the Pavese Law Firm is providing counsel on the Army Corps of Engineers permitting process. Currently the USACE reviewer has determined the marina application is complete and has initiated consultation with the US Fish and Wildlife Service and the National Marine Fisheries Service ("NMFS"). Consultation with the US Fish and Wildlife Service is complete. NMFS has requested additional information from Summer's End. In response, Summer's End has developed study protocols to generate the response in coordination with USACE and NMFS reviewers. The harbor circulation and geotechnical studies requested are complete and Summers End is coordinating the submittal of that data. Once the data is submitted, Summer's End will complete consultation with NMFS and work with the USACE on permit issuance. This is the single remaining hurdle, despite the delays occasioned by the pre-occupation of the USACE in the past two years.

There are two other matters referenced in Senate President Francis' letter of August 9, 2019 where the Senate President is seeking additional clarification on the status of the following land parcels which are addressed below:

Parcels Nos. 13A & 13B Estate Carolina: These parcels are now owned by 13-A Estate Carolina, LLC, whose managing member is Paul Sabers. Mr. Sabers complains that the proposed development will include his property. Mr. Sabers comments are misplaced as the Legislature's purview is limited to ratification of the submerged lands lease.

These parcels are not waterfront, have no relevance to the submerged lands lease and are not necessary to the project. The USACE has been notified that these parcels are no longer included in the project plans before the USACE. The parcels will be removed from the CZM land permit per the modification process provided in the CZM regulations. 12 V.I.R. & R. § 910-14. This modification will actually reduce the overall impact of the development.

In sum, Mr. Sabers' misgivings are baseless. These parcels are to be removed by a modification of the permit, to be applied for

subsequent to the ratification of the submerged lands lease by the Legislature.

Parcel No. 13 Remainder Estate Carolina: The contract date for closing of the sale of this property is tied to the final approval of necessary permits for the project. The sellers (and their son James Phillips, Jr.) have become impatient with the delays in the permit process and filed a lawsuit in the Superior Court seeking to terminate the contract. Summer's End has filed a separate action now pending in the District Court for the enforcement of the contract for sale. This contract dispute is before the courts and is not an issue for the Legislature's concern while considering the ratification of the Permit and submerged lands lease. In fact, the delays in this process are the only reason this litigation exists.

In sum, pursuant to Title 12 Virgin Islands Code section 911 (e), there are no legal issues precluding the Legislature from proceeding with its ratification of the permit and submerged lands lease, which have been approved by Governor Bryan. The major issues concerning this project have been addressed in the process created by the Coastal Zone Act; to the extent there are any other extraneous issues presented by the project opponents, there are other forums, both administrative and judicial, which will resolve them.

This project will provide a much-needed economic boost to the Virgin Islands in general and St. John in particular. Summer's End has been diligently prosecuting its permit applications, both Virgin Islands and federal, for over five (5) years. Those efforts should not be subverted by the unsubstantiated and misleading objections of the project opponents.

We, therefore, respectfully request that the 33rd Legislature fulfill its obligation by rescheduling the hearing for consideration of the submerged lands lease and ratification of the permit for Summers End.

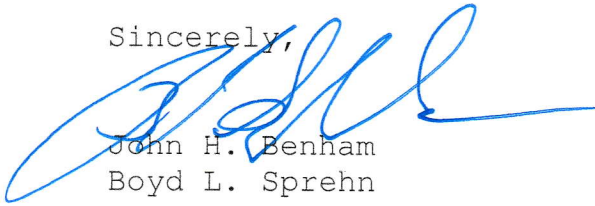
Finally, but far from least, please keep in mind that St. John Marina founding partner and former Senator, Bob O'Connor, Jr. is undergoing periodic medical treatments in the states. His current schedule has him on island and available for a hearing August 26th - 30th. If it is possible to advance the hearing schedule for when

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Mr. O'Connor is on island, we would greatly appreciate this consideration.

Please contact us with any questions, or if you require copies of any of the relevant documents relating to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to be "JH Benham", written over the typed name "John H. Benham".

John H. Benham
Boyd L. Sprehn