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The Hon. Novelle E. Francis, Jr.-Senate President
Legislature of the Virgin Islands
Capitol Building, Charlotte Amalie
P.O. Box 1690
St. Thomas, Virgin Islands 00804

Re: Coastal Zone Management Permit No. CZJ-03-14(1)/CZJ-04-14(W) and
Submerged Lands Lease
Testimony for July 7, 2020 Committee of the Whole

Honorable Senate President Francis:

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") in the Virgin Islands. In addition, Katherine English of the Pavese Firm represents Summer's End in the federal permitting process, which is taking place in Florida. This letter addresses the concerns and related questions that we understand have arisen.

We will start with the conclusion: there is no legal issue precluding the Legislature from proceeding to ratify the Permit and the submerged lands lease, and there are critical issues which strongly urge a completion to this process. Summer's End has been working through this process for six years, and the majority of the issues that will be raised here are a result of that delay.

This matter is before the Legislature pursuant to Section 911 of the Coastal Zone Management Act, which governs "Additional requirements for development or occupancy of *trust lands or other submerged or filled lands*." Section 911 describes the procedures for review and approval of applications through the Commission and its committees, before turning to the roles of the Legislature and the Governor.

(e) Approval by Governor and ratification by Legislature of coastal zone permits that include development or occupancy of trust lands or other submerged or filled lands. Any coastal zone permit which the appropriate Committee of the

Commission or the Commissioner recommends for approval pursuant to this section, together with the recommended terms and conditions thereof, shall be forwarded by the Committee or Commissioner to the Governor for the Governor's approval or disapproval within thirty days following the Committee's or Commissioner's final action on the application for the coastal zone permit or the Board's decision on appeal to grant such a permit. 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.

The task before the Legislature is to ratify the permit or lease for the submerged lands within the jurisdiction of the Virgin Islands. The permit has already completed the required full review and complete vetting process from DPNR and St. John CZM Commission that the CZM Act requires. The permit has already completed the review by the Governor of the Virgin Islands as required by CZM Act.

The following issues are addressed:

1. Legislative Immunity
2. CZM Permitting Process
3. Board of Land Use Appeals
4. Writ of Review Proceeding
5. Parcels 13 A and B, Estate Carolina and Littoral Development
6. Basis for Submerged Land Fees
7. Economic Opportunities for Recovery and Development

To be very clear, none of these matters prevent the Legislature from acting now. In fact, these issues strongly urge the Legislature's action at the earliest possible date. With your action, the Summer's End Group can provide substantial jobs, investment and opportunity within a very short period of time, to assist the Territory and specifically St. John in recovery from Covid-19 and to build new opportunities for tourism and the marine industry.

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 St. John Marina ("Project" or "Marina") will fill that void. This Project 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”).

Legislative Immunity. The efforts to manipulate the process have been extensive. We have recently been informed that Senators have been threatened with lawsuits if the matter should proceed. Such behavior is unfortunately in keeping with some of the threats that the principals of Summer’s End have received, which have gone well beyond civil discourse. The short response is that any threat to sue the members of this body are meaningless.

The Revised Organic Act of 1954 provides in Section 6:

[Immunity of members]

(d) No member of the legislature shall be held to answer *before any tribunal other than the legislature* for any speech or debate in the legislature and the members shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at the sessions of the legislature and in going to and returning from the same.

[Emphasis added.]

CZM Approval. 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, the Superior Court and this body. Every time the merits of the Project have been considered the Project 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.

No further action is required by the St. John Committee of the Coastal Zone Commission and this matter is not required to be returned to the Committee. No new permits have been sought.

The National Oceanic and Atmospheric Administration (“NOAA”), the federal agency responsible for overseeing the CZM permitting process, responded to the Oppositions’ claims of regarding the process below with an investigation and report. That report, dated July 2018, reviewed ten years of actions (2007-2017). A copy is attached as Exhibit A.

“As discussed in the findings, the process used during the review by the coastal zone management committee on St. John was consistent with the program’s normal program procedures. The Office for Coastal Management understands that the decision made by the coastal zone was appealed to the Board of Land Use Appeals, where it was upheld...”

NOAA's report also states:

"...we did discuss the permitting process with many stakeholders and did not observe or hear about any patterns similar to what Mr. Silverman describes in his comments. Additionally, there are examples (including projects on St. John) when the CZM committees have ruled against the recommendations prepared by the coastal program staff review, indicating that the committees are providing novel input and not simply 'rubber stamping'."

Jeffery L. Payne, PhD, Director, NOAA Office for Coastal Management states in the conclusion of the independent NOAA report:

"For the reasons stated herein, I find that the U.S. Virgin Islands is adhering to the programmatic requirements of the Coastal Zone Management Act and its implementing regulations in the operation of its approved U.S. Virgin Islands Coastal Zone Management Program."

This project has gone through the CZM review process, including staff review, Committee review, public notice and hearings. It has (as detailed below), undergone appellate review. In all instances, it has been approved. No further action is required by the St. John Committee of the Coastal Zone Commission and this matter is not required to be returned to the Committee, nor is it intended that the Legislature is required to redo the work of the Committee and staff.

BLUA Appeals. In 2014, following the issuance of the CZM Permits, the opponents of the Project pursued an appeal of both the land and water permits to the Board of Land Use Appeals ("BLUA"). BLUA considered all the materials in the administrative record and, after nearly 17 months, affirmed the issuance of both the water and land permits on June 6, 2016, after explicitly finding that the CZM Committee had made all the required legal findings.

The BLUA decision also consolidated the land and water permits for the Project, an action requested by the project opponents and in which Summer's End agreed. This consolidation was 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. ...

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. Any other reading of the BLUA decision would require ignoring the fact the BLUA affirmed the issuance of the Permits.

Following the October 2019 hearing before this body, Governor Bryan reviewed the permits and a consolidated permit was prepared administratively; that consolidated permit contains the same terms as the original two permits.¹ That administrative consolidation does not result in a new permit, and no action by the St. John Committee of the Coastal Zone Commission was required.

In coordination with the Consolidated Permit, the Governor reviewed the Permit and addressed the concerns expressed by Senators at the October 2019 hearing that the project had changed over the intervening years. As a result of that review, the Governor pursuant to his authority under the Coastal Zone Management Act, issued a Modification of Permit. On December 18, 2019, Governor Bryan transmitted to the Senate the Consolidated Permit, the Modification and explained his reasoning in a transmittal letter. (Attached as Exhibits B, C and D to this letter are, respectively, the Consolidated Permit, the Governor's Modification, and Governor Bryan's Transmittal letter.)

On January 30, 2020, the Virgin Islands Conservation Society, with the affidavit of David Silverman in support, filed an appeal with the Board of Land Use Appeals challenging the CZM Permit in this matter. That appeal *should have already been denied*. As an initial matter, David Silverman is acting in a clear conflict of interest, both serving as a current member of the St. John Committee of the Coastal Zone Management Commission *and* participating as a witness and/or complainant before the Board of Land Use Appeals, purporting to challenge the St. John Committee on which he has been appointed to serve.

There are three immediate legal issues concerning this appeal:

- The Board of Land Use Appeals has no jurisdiction to hear this appeal
- The Board of Land Use Appeals is ignoring the law and failing to comply with its time limits.
- The Board of Land Use Appeals has already heard an appeal on this matter, affirmed the issuance of the permits and ordered the consolidation the permits into a single permit, which has been done.

On the first issue, the Board has jurisdiction to hear appeals from the CZM Committees, the Commissioner and the Director. None of those entities have taken any new action that is subject to appeal. The consolidation of the permits was ordered by the Board of Land Use Appeals on

¹ The Consolidated Permits contain an error in the dates of certain documents. SEG has identified that error to CZM and the Governor's office and requested a correction.

June 6, 2016. Actions by the Governor, which are authorized under the Act, are not subject to Board review. Summer's End Group has moved to dismiss this matter for lack of subject matter jurisdiction, first in February, again in March and again in May; the Virgin Islands Department of Justice, acting on behalf of the CZM Committee, has joined in the Motions to Dismiss². To date, the Board of Land Use Appeals has not responded.

Second, the CZM Act imposes the following time limits on appeals:

- Appeal must be filed with 45 days of Commission decision. (§914(a).) The decision was made in October 2014, and already has been appealed. That appeal took 16 months to conclude.
- A public hearing must be scheduled within 60 days of the filing of the appeal. (§914(c).) The Board has instead twice issued scheduling orders that completely ignore this requirement. We are presently *five months (151 days)* after the filing of the appeal; no hearing has been scheduled, and by the regulations of the Board, one cannot be scheduled any earlier than July 20, 2020.
- A decision must be issued within 30 days of the hearing. (§914(c).) No target date for compliance has been set.
- The deadlines set by the Legislature say that an appeal of a CZM permit should be completed within 90 days. At the present time, there is no possibility of the Board of Land Use Appeals completing this appeal in less than 180 days.

Presently before the Legislature is Bill No. 33-0155, which proposes a number of amendments to the CZM Act. That legislation proposes to *reduce* the above time limits, but as clearly shown, the Board is ignoring the current law both as to jurisdiction and time limits.

All briefing has been completed in accord with the schedule set out by the Board of Land Use Appeals. For your information and convenience, the Brief of the St. John Committee of the CZM is attached as Exhibit E. In that Brief on page 1 the Virgin Islands Department of Justice states:

Now, VI. Conservation Society (hereinafter "Appellant") makes repeated references throughout its notice of appeal and its opening brief to a "new permit." To be clear: No "new permit" exists. In its Decision and Order dated June 6, 2016 this Board affirmed CZM's issuance of Permit Nos. CZJ03-14(L) and (W), and ordered them consolidated. In conformance with the Board's Order, Chairman Penn summarily re-executed Permit Nos. CZJ-03-14 (L) and CZJ-03-14 (W) as Consolidated Permit CZJ-03-14(L)/ CZJ-03-14(W). No new action has

² See St. John Committee of the Coastal Zone Management Commission's Notice of Joinder in Summer's End Group's Motion to Dismiss and Motion to Stay Briefing While Said Motions Are Pending, dated April 8, 2020. As the Board of Land Use Appeals took no action, the Briefing was completed.

been taken by the CZM Committee giving rise to an appeal within this Board's jurisdiction.

The Department of Justice goes on to state:

12 V.I.C. §911 (e) and (g) collectively authorize the Governor to approve, modify, and transmit permits to the legislature for ratification. On December 18, 2019 Governor Bryan, pursuant to this authority, presented Intervenor's consolidated permit to the legislature for ratification. While Appellant focuses on the last sentence of § 911 (g) arguing that the Governor's power to modify is limited to those instances where his modifications are necessary to prevent significant environmental damage. ... In doing so, Appellant disregards the remainder of the statutory provision. However, in interpreting a statute, the Board is not guided by a single sentence or portion of a sentence, but looks to the provisions of the whole law, and to its object and policy. *Dole v. United Steel Workers of America*, 494 S.Ct. 26, 34, 108 L. Ed. 2d 23, 110 S. Ct. 929 (1990). When the whole statutory provision is taken into account, it becomes indisputably apparent that the Governor indeed acted within his authority to modify the permit before transmitting it to the legislature for ratification. ...

Id. at page 5.

In conclusion, there has been no action by the CZM Committee; this appeal addresses the same permits previously appealed and affirmed, and the Governor has acted within his statutory responsibility. This is the position of the Department of Justice as well as the Summer's End Group.

Writs of Review. 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 – more than three years. Despite repeated entreaties from Summer's End, no decision has been made by the court.³ Project opponents have remained silent, preferring no action to a decision on the merits.

³ On April 10, 2018, Summer's End filed a Motion to Expedite; neither the Moravian Church nor Virgin Islands Conservation Society ever responded.

On October 18, 2018, Summer's End filed a motion for expedited Oral Argument; neither the Moravian Church nor Virgin Islands Conservation Society ever responded.

On January 14, 2019, Attorney Treston Moore wrote the Court on behalf of Summer's End seeking action on this matter; all parties were copied. Neither the Moravian Church nor Virgin Islands Conservation Society ever responded.

On January 30, 2019, Summer's End filed a motion to correct the Record, as yet another attempt to prompt action on the writs. Neither the Moravian Church nor Virgin Islands Conservation Society ever responded.

No stay of the permit was issued by the Superior Court nor was a stay ever sought by the opponents. Let us be clear on that point – there is no stay because none has been requested or issued; a stay is not automatic. In order to be entitled to a stay, the Project’s opponents would have to demonstrate a likelihood of success on the merits and post the appropriate bond for costs; that has not even been attempted.

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. In fact, the Legislature’s action on the Permit and the submerged lands lease may very well moot the writ actions, terminating the litigation.

Parcels 13 A and B, Estate Carolina and Littoral Development. We have previously addressed the question of Parcels 13 A and B in the Permit as originally requested and issued. As noted before, due to the delays in completing the Territorial permitting process the decision had to be made to not exercise the option to purchase, and those properties were subsequently purchased by 13-A Estate Carolina, LLC, whose managing member is Paul Sabers. The Modifications by Governor Bryan specifically reference the removal of those parcels from this project. (See Exhibit C, page 2.)

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 have been removed from Consolidated Major Coastal Zone Management Permit No. CZJ-04-14 (W) & CZJ-03-14(L) by the Governor’s Modification letter and as permitted 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.

As noted, neither of these parcels is a waterfront parcel. As a result, there are no littoral rights attached to those parcels. Attached as Exhibit F is a letter dated August 11, 2014, from Attorney John H. Benham to then-CZM Director J.P. Oriol, in which Attorney John Benham describes the rights and the limits of the doctrine of littoral rights. A littoral landowner is the owner of property which borders an ocean, sea or lake. *Alexander Hamilton Life Ins. v. Gov't of the Virgin Islands*, 757 F.2d 53, 538 (3rd Cir. 1985). The Department of Planning and Natural Resources' own rules and regulations recognize the concept of littoral ownership. 12 V.I.R.&R. §902-2 – Definitions. But Estate Carolina Parcels 13 A and B do not border the ocean or sea – Parcel 13 Remainder is between both 13 A and B and water. As described in detail in yet another letter on littoral rights, the littoral rights necessary remain in the hands of the Summer's End Group. See Exhibit G, letter from John H. Benham, Esq., to Chaliess N. Summers, dated June 30, 2016.

In sum, Mr. Sabers' misgivings are baseless, and he is seeking relief he is not entitled to receive.

Basis for Submerged Land Fees. In October 2019, now-CZM Director Hibbert stated that the fees for the submerged lands were developed in an inappropriate manner but failed to articulate the basis of that assertion. Attached as Exhibit H is the Basis for Negotiation document prepared by CZM, under then-Director J.P. Oriol, in 2014.

A negotiated fee of \$194,026.46 per year (once developed) and a construction period fee of \$64,027.08 per year for the submerged lands lease for this consolidated permit has been established. Those fees are subject to increases beginning in the fifth year.

While current CZM Director Hibbert was not involved in the original negotiation of these fees, CZM choose the uplands parcel used for assessing Fair Market Value, and calculated fees based on that assessment. Those fees were presented to SEG and accepted. CZM has acknowledged that negotiations proceeded in good faith and were agreed, and "the negotiated fees stand." In an email dated December 17, 2019, from Marlon Hibbert, Director CZM, to Chaliess Summers, CZM Director Hibbert stated "The permit sent to the legislature reflects the agreement between the parties."

Economic Opportunities for Recovery and Development. We have discussed in the past the extensive financial benefits available to the Virgin Islands, particularly to St. John and the maritime tourism industry. However, the recent crisis created by the Covid-19 pandemic and the resulting loss of tourism has created at least as much economic damage as another hurricane.

Oxford Economics has prepared studies looking at both the tourism sector generally in the United States, and the economic effects of the St. John Marina. As to the overall impact of Covid-19 on tourism, in March 2020 Oxford Economics prepared a study which anticipated either a full re-opening on June 1, 2020 or a 50 percent re-opening and subsequent return to full operation – we now know that both scenarios were far too optimistic. Cruise ship arrivals ceased

in mid-March and will not resume until at least September 15th – a full half year lost. Air traffic all but ceased for 2½ months and continues to be well below normal. Restoration of the hotels has now been put further off into the future. Yet, even under the more optimistic forecast Oxford assumed, the losses were significant:

The Economic Impact of the Coronavirus Due to Travel Losses 2020 - Oxford Economics: Overview of US travel industry in 2020

- 31% decline for 2020
- 75% drop in revenue over next two months
- \$355 billion losses over the rest of 2020
- Protracted recession to last 3 quarters w/ lowest point in the 2nd quarter
- 4.6 million jobs lost resulting from travel declines in 2020
- Travel industry losses exceed any other sector

Losses expected to be *SIX* times the impact of 9/11. Given the high reliance of the Territory on tourism, the damage here has been and will be significant.

“The greatest opportunity to mitigate these losses is to reduce the time required for a recovery. While typical recovery times from a disease-related crisis range from 12-16 months, this can be shortened through strategic promotions and the support of the travel industry.”

The St. John Marina can help. Oxford Economics studied the potential impacts of the St. John Marina:

St. John Marina Coral Bay, USVI: Economic Impact During Development And Construction:

- 362 jobs Territory-wide as an initial employment impact;
- \$29.8 million labor income;
 - \$82,000 per job on average;
- \$34 million spent locally on development and construction; and
- \$45.8 million total initial economic impact.

Annual Impacts during Operations:

- \$46.4 million territory wide economic impact 1st year operations, including \$13.5 million in total labor income, supporting 376 jobs;
- \$9.6 million local impact 1st year of operations;
- 80+ long-term full-time jobs (FTE);
- \$73 million investment on St. John privately funded;
- \$232 million territory wide first five years of operations;

Major economic development projects and private investment are critical components for the economic recovery of the Virgin Islands from the effects of COVID-19 and 2017 hurricane impacts. The St. John Marina, with final approvals from our 33rd Legislature, is positioned as one of the Territory's most powerful economic impacts that can move into construction in 2020.

Concluding Remarks: 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 six (6) 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 approving the submerged lands lease and ratification of the permit for Summers End.

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

Sincerely,

/s/Boyd L. Sprehn

Boyd L. Sprehn

cc:

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