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July 1, 2020

Sen. Novelle E. Francis
Senate President
33rd Legislature of the Virgin Islands
Capitol Building, Charlotte Amalie
P.O. Box 1690
St. Thomas, Virgin Islands 00804

Re: Summers End Group CZM Permitting Issues

Dear President Francis:

I write as counsel for the Virgin Islands Conservation Society (VICS) regarding the status of the CZM permitting issues relating to Summers End Group (SEG). I last wrote to you on August 23, 2019, prior to the previous Committee of the Whole meeting. A copy of that letter, without the attachments, is appended to this letter. None of the deficiencies noted in my August 23, 2019 letter have been properly addressed since then. Additionally, there are new issues that have arisen. This letter will focus on those new issues. These new issues are best characterized as efforts to evade the requirements of the CZM Act.

NEW ACTIVITY

There are three significant developments since my last letter (and the Legislature's decision in December 2019 to refuse to ratify the Land and Water CZM Permits that SEG had submitted):

First, SEG submitted a proposed consolidation of the previously separate permits to the Executive Branch. This consolidated permit was signed by the Chairman of the St. John Committee of the Virgin Islands Coastal Zone Management Commission. *It was not shown to or approved by the Committee itself and no vote on it was held.*

Second, simultaneously with the submission of this draft permit, SEG asked the Governor to modify the consolidated permit using his authority to take action to modify an approved permit when necessary to prevent significant environmental damage—and the Governor did so.

Third, VICS filed an appeal of the consolidated permit to the Board of Land Use Appeals. That appeal is fully briefed but the Board has not scheduled argument on it. This latest appeal focuses on two primary issues:

1. As noted, the new, consolidated, permit that SEG now relies upon was signed solely by the Chairman of the St. John CZM Committee and there was no vote of the Committee itself to approve the issuance of this permit. But, on December 10, 2019, the Legislature advised Summers End Group that it had concluded that the previous permit it submitted to it was "defective" because it "was modified and issued unilaterally by the Chairman of the St. John Committee without a vote of approval or any other involvement of the St. John Committee." It beggars belief that SEG has now once again returned to the Legislature seeking ratification of a permit signed solely by the Chairman.

   SEG now claims that the signature of the Chairman was a ministerial task since the St. John CZM Committee had been ordered by the Board of Land Use Appeals to issue the consolidated permit. But, the Legislature disagreed in December 2019 and nothing has changed seven months later. The law is clear that a major CZM Permit may only be issued by the Committee. Moreover, the consolidated permit that was issued did not even comply with the mandate of the Board of Land Use Appeals. In its order on the appeal from the issuance of the two separate permits, the Board directed that the bond requirement be doubled to a maximum of $10 million since the prior, separate permits had *each* required a bond of a maximum of $5 million. But, the consolidated permit approved by the chairman required a bond of a maximum of $5 million in direct contravention of the Board's order that it be raised to $10 million. It cannot be a ministerial task to cut the bond requirement in half.

2. The modification of the permit by the Governor was contrary to law. The Governor relied upon 12 V.I.C. § 911(g) to modify the permit. Section 911(g) is a provision that is designed to allow the Governor to act in an emergency fashion to put a stop to environmental damage being caused by work being done under a previously approved ratified permit. It is for this reason that Section 911(g) begins with the statement that it is "[i]n addition to any other powers of *enforcement* set forth in Section 913 . . . ." (Emphasis added.) Thus, when a development is causing or threatening environmental damage the Executive Branch may engage in enforcement measures but may also, through the Governor, unilaterally modify the existing permit to stave off possible or further damage.

   Section 911(g) was not created to allow the Governor to modify a permit as it is going through the permit approval process. By the very nature of that process, a project that will likely result in "significant environmental damage" will not be approved by the CZM Committee and thus never reach the Governor's desk

> for approval. Here, the permit is still in the approval process as the Legislature has not ratified the permit as provided for in 12 V.I.C. § 911(e). There is no permit yet to modify and Section 911(g) is not applicable.

FUTURE ACTIVITY

We expect that no matter how the Board of Land Use Appeals rules on the latest challenge to the permit, the matter will be headed to the Superior Court for a second writ of review. Further, in response to that appeal SEG has argued that the Board lacks jurisdiction over the pending appeal filed by VICS. If the Board should agree with SEG on that point, VICS will initiate two proceedings in the Superior Court: One will be a writ of review because we believe that the Board does have jurisdiction. The second will a proceeding brought pursuant to 12 V.I.C. § 913(b)(1) to seek a declaration that the Governor exceeded his powers when he modified the permit.

THE CURRENT STATUS OF THE WRIT OF REVIEW PROCEEDING:

The writ of review remains pending before the Hon. Michael C. Dunston in the Superior Court of the Virgin Islands. The issues for review are fully briefed and the parties are awaiting a decision. A summary of the issues raised in that proceeding was included in my August 23, 2019 letter.

THE LEGISLATURE SHOULD END THIS MATTER BY VOTING TO DENY RATIFICATION

It is evident that SEG is determined to ignore the Legislature—just as it is determined to ignore the CZM Act. It ignored the Legislature's December 10, 2019 letter by returning with the consolidated permit but still insisting—contrary to the letter—that the permit need not be approved by the CZM Committee. In that same December 10, 2019 letter, the Legislature also told SEG

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

(Emphasis added.)

SEG elected to ignore the Legislature. Rather than submit a new application for a permit, SEG instead engaged in the charade of asking the Governor to modify the permit unilaterally—and without any public input. There are procedures available to an applicant to seek a modification of a permit or permit application and, depending upon the scope of the modification, that may require submitting a new permit application.[1]

Finally, it is important to recognize that the infirmities that the Legislature noted—the fact that the project approved in 2014 is not the project that SEG intends to develop today—are not new. The main change is the removal of Parcels 13-A and 13-B, Estate Carolina. That was an issue in 2014 as well. One of the grounds VICS relied upon to oppose the issuance of the permit and then appeal it to the Board of Land Use Appeals was the fact that SEG had failed to demonstrate the requisite ownership or control of Parcels 13-A and 13-B, Estate Carolina. The Board (which is a part of the Executive Branch) completely ignored this argument and affirmed the permits. (That failure to address the ownership issue is one of the issues that is still pending as part of the pending writ of review of the Board's decision.) Now, after four years, the Governor—the head of the Executive Branch—has declared that the inclusion of Parcels 13-A and 13-B in the permit creates a risk of significant environmental damage that requires him to modify the permit. Nothing about SEG's lack of control over Parcels 13-A and 13-B changed between the time the CZM Committee first approved the permits and the time the Governor modified the consolidated permit. SEG has *never* wanted to present its proposal to CZM without those two parcels included because it *knows* that without those two parcels, its proposal cannot withstand serious scrutiny. It is for that reason that SEG insists upon playing this shell game with Parcels 13-A and 13-B.

CONCLUSION

SEG's proposal needs to go back to CZM for a brand new review. It appears that unless this Legislature speaks more forcefully than it did in its December 10, 2019 letter, SEG will continue to try to evade that process. Accordingly, VICS respectfully submits that the Legislature should formally vote to reject ratification of the current permit. Perhaps then SEG will finally decide to comply with the law.

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[1] The regulations applicable to the permitting process provide two vehicles for an applicant to change a permit, depending upon the stage at which the change is sought. If the change sought at least 30 days before the public hearing on the application, it will be accepted unless it would "substantially modify the scope, nature or characteristics of the proposed development." 12 V.I.R.&R. § 910-4(b). On the other hand, if the applicant seeks a modification of an approved permit, it is treated as a new application for a permit, unless the modification "would not substantially alter or modify the scope, nature or characteristics of the existing permit or approved development." 12 V.I.R.&R. § 910-14(a).

Respectfully,

Andrew C. Simpson

encl. (Aug. 23, 2019 letter)

cc: All Senators
Legislative Counsel

August 23, 2019 letter

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33rd Legislature of the Virgin Islands
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St. Thomas, Virgin Islands 00804

Re: Summers End Group CZM Permitting Issues

Dear Senator Francis:

I write as counsel for the Virgin Islands Conservation Society (VICS) regarding the CZM permitting issues relating to Summers End Group. There has been a great deal of misinformation distributed about the current status of the permits for the Summers End Group proposed marina and it is important that you and your colleagues know the truth. It makes no sense for the Senators to expend political capital approving a CZM permit that is invalid.

THE CURRENT STATUS OF THE PERMIT:

I attach for your reference the permits that were issued to Summers End Group by the CZM Committee. I think it is important for you to see them because *the permit that I understand you are scheduled to vote on is not the permit that was issued by the CZM Committee*. The permits were signed on October 24, 2014, yet the Senate has been presented with a *new* water permit that was signed on March 28, 2019.

You will also note that both CZM permits (CZJ-04-14(W) and CZJ-03-14(L) require that development commence within 12 months from the effective date of the permit and then continue until completion. Please note that if at least 50% of the work is not completed within the 12 month period, the permit will "terminate automatically and render it null and void" unless the permittee obtains an extension. See General Condition 5.F in each permit. The permittee does not get to restart the clock for commencing development by getting the Chairman of the CZM Committee to sign a new version of the permit.

The permits were issued on October 24, 2014. VICS appealed the permits to the

Board of Land Use Appeals. That appeal automatically stayed the permits (including the time for commencing and completing work). *See* 12 V.I.C. § 910(d)(5). However, the stay is only in effect while it is pending a decision on appeal. *Id.* BLUA decided the appeal on June 6, 2016, which restarted the 12 month time period. To date, Summers End Group has done nothing to either commence or complete construction and thus the permits are invalid as a matter of law. (VICS filed a writ of review of the BLUA decision to the Superior Court of the Virgin Islands and that review proceeding remains pending. But, a writ of review is not an appeal and does not stay the permit.)

Further, BLUA affirmed the issuance of the permits but ordered that the two permits be consolidated. *See* attached Order from BLUA. That has never happened, and the permit that Summers End Group has apparently submitted to the Legislature to be approved is only the Water permit rather than a consolidated permit.

THE CURRENT STATUS OF THE WRIT OF REVIEW PROCEEDING:

The writ of review is presently pending before the Hon. Michael C. Dunston in the Superior Court of the Virgin Islands. The issues for review are fully briefed and the parties are awaiting a decision from Presiding Judge Dunston. In that proceeding, VICS raises the following arguments:

1. The St John CZM Committee failed to consider the cumulative impacts of land and water development, as required by 12 V.I.C. § 903.

2. Virgin Islands Board of Land Use Appeals (BLUA) lacks the authority to consolidate permits by order. The applicant must file a single CZM Major Land and Water permit application.

3. The CZM application submitted by the Summers End Group was insufficient as a matter of law. SEG failed to establish that it had the legal interest to develop the property in accordance with its proposal.

4. The Environmental Assessment Report ("EAR") of the Summers End Group has a multitude of deficiencies and fails to meet the legal requirements of the CZM act.

5. The Submerged Land Lease does not comply with the requirements of VI Code and Regulations for the computation of the fee and the reasons for substantial fee discounts.

6. There was an improper participation of a CZM commissioner with a conflict of interest.

7. CZM-STJ's actions were arbitrary and capricious and failed to comply with the CZMA. It erred because it:

a. failed to consolidate the two permit applications and consider the cumulative impact of the development upon the entire coastal zone;

b. failed to consolidate the two permit applications and therefore did not subject the land-aspects of the development to the scrutiny required in 12 V.I.C. § 911;

c. granted the permits when SEG had failed to prove that it had the required legal interest in the properties and authority to develop the properties;

d. granted the permits when the EARs were insufficient, both as a matter of law and of fact;

e. failed to make any findings of fact that allowed its decisions to be properly reviewed on appeal;

f. failed to make all of the conclusions required by 12 V.I.C. § 911(c);

g. made some of the conclusions (by adopting CZM Staff recommendations) required by 12 V.I.C. §§ 910 and 910(c) when those conclusions are not supported by the substantial evidence of record;

h. failed to state the basis for the rental calculations for the Water Permit as required by the CZMA;

i. imposed improper conditions upon the Water Permit; and

j. proceeded to consider the permit with the participation of a Committee member who was disqualified from taking any steps to advance the progress of the permit.

8. The decision of VIBLUA was erroneous because it

a. consolidated, without any statutory authority, the Land Permit and Water Permit instead of vacating the two permits when it recognized that they were improperly considered separately;

b. affirmed the decision of CZM-STJ despite all of the errors listed above.

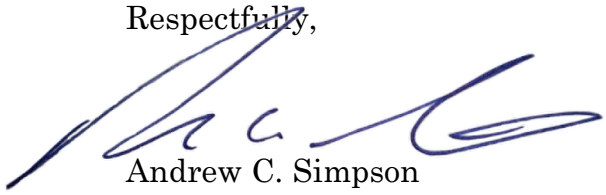
Senator, let's take just one of those issues—No. 7.c. (SEG failed to prove that it had the required legal interest). It is a matter of public record (Doc. No. 2014005850 recorded in the Office of the Recorder of Deeds for St. Thomas/St. John on July 22, 2014) the Superior Court Marshal sold Parcel No. 13-A Estate Carolina, No.1 Coral Bay Quarter, St. John, U.S. Virgin Islands on September 13, 2013 due to a judgment

obtained against the owner by Merchants Commercial Bank. That public record further established that Merchants Commercial Bank assigned the certificate of marshal's sale to 13-A Estate Carolina, LLC.

If you review the land permit (which BLUA ordered be consolidated with the water permit), you will see that it authorizes construction on, *inter alia*, Plot 13A. But, SEG *never* received permission from either Merchants Bank or 13-A Estate Carolina. LLC to use its property for this development. *No matter what action the Senate takes on the water permit* (assuming it is still valid), this project can never be built because SEG lacks the permission of the property owner of Parcel No. 13-A to build on its property.

At the very least, the Senate should refrain from taking any action until Judge Dunstan has ruled.

Respectfully,



Andrew C. Simpson

cc: All Senators
Legislative Counsel