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

October 24, 2019

re: **Testimony before the Oct 28, 2019 Meeting of the Committee of the Whole**

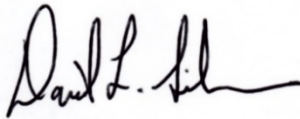
Dear President Francis,

Thank you for the opportunity to testify before the Committee of the Whole meeting scheduled for Monday, October 28, 2019, regarding CZM permits for the Summer's End Group LLC. I look forward to presenting information that may help the Legislature determine the best way forward with these permits.

Attached please find my testimony which I hope to be able to present in its entirety. I also have a number of supporting documents that I will endeavor to provide to your office in electronic form prior to the committee meeting.

Respectfully submitted,

Regards,



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Attachments: Testimony Before Committee of the Whole

COMMITTEE OF THE WHOLE – VIRGIN ISLANDS LEGISLATURE

President Francis, Honorable Senators, friends and neighbors,

Just over five years ago I sat in this same room, at this same table, and explained in detail why the CZM permit applications by the Summers End Group should not be approved. At that meeting I pointed to the flaws in the application documents, the lack of legal authority, and the inconsistencies with the goals, policies and standards of the VI CZM Act.

At that time, as well as today, I had no vested interest in the outcome of the Summers End project. I am not a Coral Bay rental villa owner. I am not a boat owner. I do not operate a business in Coral Bay. And I am not an investor in this or any other marina project.

My interest comes solely from the fact that I have spent over 30 years in Coastal Zone Management at the federal and local and territorial level. I am a firm believer in the principles behind the Coastal Zone Management Act and I believe that all Virgin Islanders have benefitted, and in the future will continue to benefit from adherence to the goals and policies of this act.

My testimony today deals primarily with the legal deficiencies in the documents before you. I will also touch upon serious issues involving the project itself. I will try to keep my testimony brief and not repeat what others have said, but there is a lot of ground to cover.

DEFECTS IN THE 2019 CZM PERMIT

Because I have been involved in this project for so many years, I may have perspectives on the project which others do not have. I would like to begin with some observations on the actual document before the Committee of the Whole, CZM Major Water Permit CZJ-04-14(W) sent to the Senate President under a transmittal letter from Governor Albert Bryan dated April 5, 2019.

In October 2014, a CZM Major Water Permit for the Summers End Group was approved by the St John CZM Committee. It was then signed and dated by the Chair of the committee, forwarded to then Governor John DeJongh Jr., and forwarded by him to then Senate President Sean Malone.

First, the permit before you, forwarded by Governor Bryan, is NOT THE SAME PERMIT that was approved by the St John CZM Committee in 2014.

Although the permit is signed by the CZM Committee Chair and dated March 17, 2019, there never has been a CZM Committee meeting or decision to approve this version of the permit. I know that for a fact because I have been a member of the St John CZM Committee since October 12, 2018.

The language of the 2019 permit, before this committee, differs from the language of the 2014 permit in several places. There is a clause dealing with permit fee computation which is in the 2014 permit and has been deleted from the 2019 permit. There is an entire attachment on the 2019 permit, dealing with Trust Land Occupancy Fee calculations, which did not appear on the

2014 permit. And, of course, the 2014 permit was signed and dated October 2014, not March 2019.

I have included with my submitted testimony a marked up document comparing the 2014 permit with the 2019 permit and highlighting the changes.

Second, the permit before you does not comply with a direct order of the Board of Land Use Appeals. Although the transmittal letter from Governor Bryan made mention of the BLUA order, his letter mischaracterized the impact of that explicit order.

The Governor's cover letter reads as follows:

"In the ruling made by (BLUA) regarding the issuance of the land and water permits ... BLUA placed a condition that development activities of the land permit could not commence without the water permit receiving all necessary territorial and federal approvals."

The Governor may well have been misinformed, because BLUA did not place such a condition on the land permit. The order from BLUA was explicit. It states the following:

"IT IS HEREBY ORDERED that the Permits at issue, Nos. CZJ-03-14(L) and CZJ-04-14(W), be consolidated"

This is not a condition on the land permit. It makes absolutely no mention of territorial or federal approvals as a condition for commencement. This is an explicit order for the applicant to DO SOMETHING – specifically an order to CONSOLIDATE two separate land and water permits into a single consolidated permit application.

The reasoning behind the order and the testimony supporting that reasoning are all in the transcript of the BLUA hearing and the body of the BLUA decision. To date the applicant has taken no steps to comply with the BLUA order. A consolidated permit application has not been filed with CZM.

It is therefore a direct violation of a lawful order of the Board of Land Use Appeals to even be considering the standalone CZM Major Water permit before you today. I have included in my supporting documents the complete order from the Board of Land Use Appeals.

Third, the permit before you is the subject of two lawsuits filed in Virgin Islands Superior Court. Following the BLUA decision and order in July 2016, the Virgin Islands Moravian Conference filed a lawsuit contesting the validity of the CZM permits. That same month the Virgin Islands Conservation Society filed a lawsuit for a Writ of Judicial review of the CZM and BLUA decisions.

These two lawsuits have been fully briefed and are awaiting a decision from the Superior Court. It is my expectation, based on the arguments presented by all parties, that the court will find serious errors in the decisions of CZM and BLUA and will vacate the subject permits. However, regardless of the outcome in Superior Court, it seems ill advised for this Legislature to proceed

to deliberate on the ratification of permits which may soon be either confirmed by the Court, or more likely, rendered moot. I have included copies of both lawsuits in my submission materials.

Fourth, the permit before you is being contested by private land owners who are the legal owners of parcels of land included within the marina project. It is my understanding that out of the seven parcels of land identified in the Governor's transmittal letter and in the CZM permits, that five of the seven parcels are owned by individuals who do not give their consent to the construction of the Summers End Group marina on or offshore of their private property.

Two of the parcels were purchased by Mr. Paul Sabers in 2016. These parcels, identified as 13-A Carolina and 13-B Carolina, cannot be used by the Summers End Group. In fact, in their United States Army Corps of Engineers permit application, Summers End has removed those parcels from their project plan but they have made no effort to remove these parcels from their CZM plans. These parcels were critical to the storm water mitigation measures originally proposed by Summer's End to the CZM committee. The removal of these parcels from their plans is a major change to the CZM application.

Two of the waterfront parcels – identified as 10-17 and 10-18 Carolina – are owned by the Marsh Sisters Trust. The trustees of that entity are Mrs. Eglah Clendinen and Mrs. Minerva Marsh Vasquez. It is my understanding that both of the Marsh sisters are suffering from age related cognitive issues, and their adult children are now representing their interests. The Clendinen family has apparently decided that after many years of non-payment of rents, after several legal documents having been signed without benefit of legal counsel, that they no longer wish to have anything to do with the Summers End Group and are seeking legal advice to terminate the agreements signed by their elderly family members.

Finally, Parcel 13 Remainder, which includes the largest stretch of waterfront within the Summers End project, is owned by Jim Phillips and Beva Rodriguez. I believe that their representative, James Phillips Jr., will be testifying to the fact that the Phillips family is currently involved in litigation with the Summers End Group seeking the Court's agreement that the 2013 sales agreement for Parcel 13 Remainder is null and void.

I have included several documents relevant to the changes in land ownership just described. In particular you should take note of the Army Corps site plan submission from August 2017 which shows the two central parcels of the Summers End Marina as no longer part of their submission to the Corps, even though they are still part of the CZM permit before you.

Fifth, the document before you does not represent the actual project which the Summer's End Group proposes to develop. The permit forwarded by the Governor represents the project as it existed five years ago, in 2014. It includes multiple components and features which have subsequently been removed from the project by Summer's End as a result of changes in land ownership, discovery of historic artifacts, and decisions to eliminate large elements of the plan.

In 2015 after the US Fish and Wildlife Service rescinded a Boating Infrastructure Grant award from Summers End due to false statements made on the grant application, Summer's End eliminated the "75 position mooring field" from their Army Corps application. This component is no longer in their plans and the letter from DPNR which authorized it in 2014 has long since expired.

Roughly one third of the land-based project described in the permit is constructed on parcels 13-A and 13-B Carolina. After these parcels were sold in 2016 these elements of the plan were removed from the Army Corps permit application, however they are still in the permit before you.

The docks were reconfigured in 2016 to avoid an historic shipwreck that had not been located during the marine archeological survey performed in 2014. Further research on this site indicates that it may be a wreck of significant historical importance. However the permit before you takes no account of this change in marina design.

There are numerous other technical changes in the plans, which in their entirety render these 2014 permits and associated site plans a thoroughly inaccurate representation of what is currently being reviewed before the Army Corps of Engineers. It should be apparent that, at a minimum, Summers End will need to file a new application for a CZM consolidated Land and Water permit representing the project as it is currently envisioned, and situated on land to which the applicant currently has legal rights.

And finally, the document before you includes an attachment which is headed "Basis for Negotiations – The Summers End Group LLC". This is the document which purports to compute a fair market value for the Submerged Trust Lands being used and occupied by the Summers End Group marina project.

The first thing I would like to bring to your attention is the address on the letterhead of this attachment. It reads "Charles Wesley Turnbull Regional Library." I believe you all know that CZM did not move into the Turnbull Library until after the 2017 storms. They were not located there in 2014 when the CZM permit was approved.

This is very significant because, in spite of numerous requests, CZM never provided me with a copy of the "Basis for Negotiations" document in 2014. It was not attached to the 2014 CZM Permit forwarded by Governor DeJongh to the Legislature in 2014. I have included the complete 2014 permit transmittal for your reference in my submission materials.

I would next like to draw your attention to the method by which Fair Market Value was calculated in this document. At the very top of the first page, the project location is described as "Seaward of No. 12 Carolina". However if you look at the actual permit, and the Governor's transmittal letter, you will note that No. 12 Carolina is NOT a parcel within the seven Summers End marina parcels. In fact, 12 Carolina is a mangrove wetland, not suitable for any construction, with an appraised value a fraction of the appraised value of the marina parcels.

I could go through all of the details but they are tedious and time consuming. The net result of the intentional errors in this computation of fees is that a discount over the life of the agreement amounting to well over \$6 million – close to a 90% fee discount – is being offered to the Summers End Group. At this time of difficult territorial finances it seems surprising that such a significant fee waiver should be given to a private developer.

The Virgin Islands Rules and Regulations are very clear on Trust Land fee discounts. Here is what the regulations say about fee waivers and fee reductions for submerged land leases in 12 VIRR 910-5(f):

"The Commissioner may waive or reduce rentals when he determines that such a waiver or reduction is in the public interest. The Commissioner must render such a waiver or reduction of rental in writing and specify the reasons therefor. **A copy of said decision must accompany the permit or lease when it is transmitted to the Governor for approval and to the Legislature for ratification.**"

I have never seen the rationale or reasons for a fee reduction and a determination of public interest, as required by Virgin Islands law for this project and it is certainly not accompanying the permit before you.

To summarize, these are the major defects in the document you've been asked to ratify:

1. It is not the same document that was approved by the St John CZM Committee in 2014.
2. It does not comply with the direct order of the Board of Land Use Appeals.
3. It is the subject of two lawsuits in Virgin Islands Superior Court.
4. Owners of five of the seven parcels of land included in the permit are not giving their authorization for use of their land to the Summers End Group.
5. It does not represent the project that would ultimately be developed and does not reflect all the project changes over the past five years.
6. The fee for occupancy of submerged lands is computed based on erroneous data and provides a substantial discount to the Summers End Group without the legally required explanation.

DEFECTS IN THE PERMIT APPLICATION

One could, and should ask how we've gotten to this point. The answer, in part, is because the original CZM permit application by the Summers End Group was legally deficient. I believe that the testimony of Attorney Andrew Simpson, counsel for the Virgin Islands Conservation Society, will cover the substantial defects in the CZM Permit Application and the process by which it was ultimately approved by the CZM Committee. I'll try not repeat anything he has said. However I do want to point to two fatal flaws in the permit application, flaws which are largely responsible for the situation we find ourselves in today.

First, the CZM Rules and Regulations state that when a permit applicant is not the land owner, the application must be signed by all of the land owners. 12 VIRR 910-3(b) reads as follows:

"Where the applicant is not the owner of the property, the owners must co-sign the application before it will be accepted for filing."

On the CZM permit application submitted by the Summers End Group, the signature line where property owners were required to sign, was left blank. Not a single one of the owners of the seven parcels comprising the project signed the application. By law it should never have been accepted for filing.

I have included a copy of that permit application signature page in my supporting documents.

Second, all permit applicants are required to submit an affidavit known as L&WD 5, entitled "Proof of Legal Interest." In this sworn affidavit, Chaliese Summers swore that "I have the irrevocable approvals, permission, or power of attorney from all other persons with a legal interest in the property to undertake the work proposed in the permit application." Chaliese Summers did not have this legal authority. She submitted fully revocable - not irrevocable - time limited Powers of Attorney, which did not convey ANY authority to "undertake the work proposed in the permit application." The powers of attorney were limited to only applying for permits.

Knowingly swearing to a false affidavit is a serious matter.

So the entire permit and the ensuing five years have been based upon a faulty foundation. It is time to move on, send the permit back to the Governor and require the Summers End Group to return only when they have the ownership interests and legal authorities to do what they claim they want to do.

THE SUMMERS END PROJECT

But it is also important that the Legislature consider the Summers End Group project itself – the mega yacht marina in Coral Bay Harbor – and why it has attracted such unprecedented opposition across the socio-economic spectrum. I do not have the time to delve into detail on any of the points I am about to present, but if you wish I can provide more detail in follow up questions.

First, let's talk about the size of the marina. It's important to realize that Coral Bay is a relatively small body of water. In fact, all of Coral Bay Harbor could fit five times inside Charlotte Amalie Harbor. Coral Bay Harbor stretches roughly from the WICO docks to the Legislature, an area about one fifth of Charlotte Amalie Harbor.

And yet the Summers End Group marina is larger than the largest marina in St Thomas. It is larger than Yacht Haven Grande. Its main pier extends almost a quarter mile into the harbor. The Summers End Marina is so oversized for Coral Bay that it basically prevents any other shoreline property owner from building a small marina and accessing deep water.

The Summers End developers have proposed from the very beginning that their project will cater to mega yachts up to 200 feet in length. This size motor yacht is completely infeasible in

the shallow depths of Coral Bay. On the few occasions when large yachts have attempted to navigate into Coral Harbor they have quickly retreated once they realized the available water depth was inadequate for a large yacht. The project, catering to mega yachts, is simply infeasible without extensive dredging.

I've included a set of graphics in my supporting materials which illustrate these points regarding the size of the project.

Let's next talk about federal environmental review. Although the St John CZM Committee did not have the benefit of detailed federal agency review, over the past five years while it has been in the Army Corps review process, multiple federal agencies have offered their views on the Summers End project. You won't see any of their comment letters within the CZM files, so I would like to share with you some of the most salient points and conclusions made by these agencies.

The United States Environmental Protection Agency wrote that the waters of Coral Bay are an "Aquatic Resource of National Importance." Their recommendation was explicit – they said "After reviewing the available data, the U.S. Environmental Protection Agency (EPA) believes that this project will result in significant impacts to aquatic resources of national importance. EPA thus strongly recommends the denial of a Department of the Army permit for this project."

The National Marine Fisheries Service (NMFS) is responsible for conservation of Essential Fish Habitat (EFH). They wrote: "In addition to the impacts to Aquatic Resources of National Importance, NMFS concludes the docking structure construction, mooring facility, and upland development will adversely impact EFH. Section 305(b)(4)(A) of the Magnuson-Stevens Act requires NMFS to provide EFH conservation recommendations when an activity is expected to adversely impact EFH. The Department of the Army shall not authorize the project as proposed."

The Department of the Interior, National Park Service wrote: "What is most disturbing ... is the complete lack of consideration given by the applicant to the potential negative cumulative impacts to [Virgin Islands National]Park and [Coral Reef National] Monument resources caused by the increased vessel traffic associated with the marina. There is no evidence of consideration or thought given to impacts on water quality, marine resources, wetlands (mangrove areas), coral reefs, sea grasses, fish and marine invertebrates and species of concern protected by the Endangered Species Act."

Similar strongly negative comments and analyses were provided by NOAA Protected Resources Division pursuant to the Endangered Species Act, and by the US Fish and Wildlife Service. Basically, all of the federal agencies reviewing the project and consulting with the Army Corps have determined that there would be extensive unmitigated environmental impacts from the proposed marina.

I have included the comment letters from five federal agencies with my supporting materials.

These federal agencies – NOAA, EPA, Fish and Wildlife, Department of the Interior – they are our federal partners. We should listen to and heed their advice.

As a consequence of the extensive federal agency concerns, the United States Army Corps of Engineers issued a preliminary determination on the project in January 2018. They said "Based on current site conditions and the most recent information that you (Summers End Group) have provided, my staff has preliminarily determined that your proposal may be contrary to the Public Interest. Pursuant to the Corps' Regulations at 33 CFR 320.4(a)(1) your permit application would be denied if ultimately found to be contrary to the Public Interest."

It is our opinion that the extensive impacts identified by multiple federal agencies will ultimately lead to a permit denial from the Army Corps, although it will probably take a minimum of two more years to reach this decision.

HURRICANE LESSONS

I would be remiss if I did not at least briefly mention the very significant and relevant lessons learned in the aftermath of Hurricanes Irma and Maria in 2017.

Mariners and locals have always known that Coral Bay Harbor is an exposed body of water with virtually no protection from the southeast wind and waves. This is why Hurricane Hole has traditionally been used as a safe anchorage during major storm events.

With its over 200 mph winds from the west, Hurricane Irma broke all of the rules. The supposedly safe anchorage was decimated with boat wreckage. Coral Bay itself took the brunt of innumerable tornadoes and devastatingly powerful winds.

Immediately following Irma the only access to Coral Bay was by the ocean or by the air – the roads were impassable. If Coral Bay Harbor had been littered with the wreckage of a mega yacht marina the people of Coral Bay and the East End would have been at severe risk to health and life. Given its remote location it is essential that Coral Bay always be accessible by sea and by air.

I have included in my supporting documents the engineering drawing for the marina structures submitted to the Army Corps by Summer's End in August 2017, just one month prior to the hurricanes. You'll note that in the design criteria these drawings state that the marina is designed for MAXIMUM WIND SPEED of 96 miles per hour, with a safety factor of 50%. In both Hurricane Irma as well as Hurricane Maria this marina would have been shredded into a debris field rendering Coral Bay Harbor totally unusable for emergency relief. Add to that the tens of thousands of gallons of marine fuel, the above ground septic tanks, and you have all of the element of a human and environmental disaster.

Coral Bay is simply too remote to entertain a project of this scale.

CLAIMED POSITIVE BENEFITS

So what are the positive benefits that the Summers End Group expect to see from this project? The two most often mentioned are economic growth and job creation.

The developers claim that after all phases of the project are complete, the marina will generate \$9 million in economic activity per year over the first five years of operation. However if you look closely at their economic analysis you will not only discover that the business model is highly flawed, but also that they are looking at gross economics effects and not net economic effects.

One example from the Summer's End business model is informative. In December 2018, after the major hurricanes, the CEO of Yacht Haven Grande reported that the premium for windstorm insurance had increased to \$2 million per year, an increase of 250%. The Summers End Marina is larger than Yacht Haven Grande, in a location far more exposed to wind and waves than Yacht Haven Grande. Incredibly, the Summers End business model estimates insurance costs of \$107,000 per year. This is probably off by at least two million dollars per year. This is just one of many unrealistic business assumptions built into their pie in the sky business plan.

However even more concerning is that the project as proposed will shut down multiple ongoing businesses in Coral Bay, and adversely impact a highly successful eco-tourism based economy. Literally thousands of individuals have written letters stating that they will no longer visit Coral Bay or the Virgin Islands if this project is built. The tourism economy of Coral Bay and the East End generates around \$50 million per year in economic activity for the USVI. If tourism declines by just 20% as a result of the disruption from years long construction and impacts to the natural environment, this amounts to a decline of \$10 million per year in economic activity.

So when you take a look at the NET ECONOMICS of the project it is a far less interesting proposition. Rather than generating \$9 million dollars per year in new economic activity it is likely to generate a LOSS of around \$1 million dollars per year in NET ECONOMIC activity. This is the reality of the project. It will generate profits for a small number of off-shore investors, while pushing the Virgin Islands into a deeper economic hole. We can ill afford to support such a venture.

And how about jobs for St Johnians? The reality is that the developer's claim of job creation is nothing but a myth.

If we were on St Thomas we could look out the window at an empty Yacht Haven Grande. From June through November the marinas within the hurricane belt are closed, the shops are shuttered, the employees are laid off. Marina work in the Caribbean is highly seasonal and is unsuited for a family wage earner who needs to put food on the table twelve months a year, not six months a year.

Furthermore, the number of jobs created, as presented by the developers, is the number of employees who would be working in a fully developed marina project, but it does not account for the people and jobs currently working in the marina district whose jobs will be terminated. It is not a NET NEW JOBS number.

There are currently around 45 people employed across multiple small businesses in the seven commercial parcels proposed for marina development. Many of these are year-round jobs. The developers propose to displace all of this employment, and replace it with 28 new jobs. The NET result is a loss of employment – a loss of 17 jobs - not a gain.

And finally, if you consider the quality of occupations available within the marina plan, there are only a handful of professional positions, primarily in marina management. And if you carefully scrutinize the marina plans you will see that the developers have proposed apartments for marina management. So it should be apparent that these professional jobs are not intended for local St Johnians, who all have their own homes and family. The professional jobs go to experienced marina managers from off-island.

So this is the myth of job creation. The marina jobs are part-time seasonal work. There is ZERO net job creation. And the highest paying professional jobs are not for St Johnians.

CONCLUSION

Let me conclude with a simple question: What does Coral Bay really need? Coral Bay needs appropriately scaled marine infrastructure – including access docks, marine waste management, perhaps a properly sited small marina, and better enforcement of marine regulations. Coral Bay needs year-round well paying jobs. Cultural tourism, trades, agriculture, these are all possible areas for job growth. Unfortunately the Summers End project does not address these needs.

I believe you have three options. You could send this permit back to the Governor and request that it not be resubmitted until all of the legal complexities and disputes have been resolved. You could deny the permit and instruct the applicants to return when they have obtained proper legal authorities from land owners. Or you could approve the permit and create the conditions for another round of expensive, time consuming lawsuits. My advice is clear: take the interests of all Virgin Islanders to heart, and deny this permit, allowing the community to move forward in a positive way.

Thank you and I would welcome the opportunity to answer any questions you may have.

David Silverman, Oct 28, 2019