IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

MORAVIAN CHURCH CONFERENCE OF THE VIRGIN ISLANDS, Petitioner, vs. ST. JOHN COASTAL ZONE MANAGEMENT COMMITTEE, Respondent.	) PETITION FOR WRIT OF REVIEW)No. _____

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SUPERIOR COURT

PETITION FOR WRIT OF REVIEW

COMES NOW Petitioner Moravian Church Conference of the Virgin Islands ("Petitioner" or "Moravian Church"), pursuant to 12 V.I.C. § 913(d), who seek a writ of review of the decisions of the St. John Coastal Zone Management Committee ("CZM") rendered on October 10, 2014 in the application of the Summer's End Group, LLC (the "applicant" or "SEG") and the decision of the Board of Land Use Appeals ("BLUA"), dated June 6, 2016, and issued to the parties on or about June 13, 2016, dismissing Petitioner's appeal of those decisions.

Jurisdiction

1. This court has jurisdiction over this appeal pursuant to 4 V.I.C. § 76 and 12 V.I.C. § 913(d).
2. Petitioner is a current and historic owner of shoreline property abutting Coral Bay harbor ("Petitioner's Property").
3. SEG is a developer who applied for two linked permits from CZM for the construction of a massive marina in Coral Bay harbor, a land permit (CZM Permit No. CZJ-3-14(L) or the "Land Permit") for demolition of structures, construction of structures, upgrades

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to structures, and construction of a waste treatment facility and parking facility as well as a water permit (CZM Permit No. CZJ-4-14(W) or the "Water Permit") for construction of a 145 slip marina, mooring field consisting of up to 75 moorings, and a pump-out and fuel station.

4. On October 10, 2014, CZM granted both permits over the vehement objections of Petitioner, the community, and public interest groups.
5. On November 24, 2014, Petitioner filed a timely appeal of both decisions to BLUA.
6. Though BLUA's order dismissing the appeal is dated June 6, 2016, the order was not provided to Petitioner and the other parties to the appeal until June 13, 2016 via electronic mail to the parties' respective legal counsel.
7. Thus, the instant petition for writ of review is timely, being filed less than 45 days from the date of the final decision of BLUA.

CZM Decisions and Permits

8. CZM failed to adequately satisfy 12 V.I.C. § 911(c)(1), which requires CZM to deny any application under 12 V.I.C. § 910 for the development of submerged lands absent a finding that the application is consistent with the basic goals of 12 V.I.C. § 903 and with the policies and standards of 12 V.I.C. § 906.
9. With respect to those basic goals, 12 V.I.C. § 903(b)(1)-(2), (4)-(6), and (8)-(9) identify seven relevant goals that CZM was required to find SEG had achieved.
10. With respect to the developmental policies for the first tier of the coastal zone, 12 V.I.C. § 906(a)(1), (3), and (6)-(10) identify seven relevant policies that CZM was required to find SEG had satisfied.

11. With respect to the environmental policies for the first tier of the coastal zone, 12 V.I.C. § 906(b)(1)-(6) and (8)-(10) identify eight relevant policies that CZM was required to find SEG had satisfied.
12. Pursuant to 12 V.I.C. § 910(a)(2)(B), SEG had the burden of proof to demonstrate that the development 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.
13. Absent a finding that SEG had overcome that burden, the permit application had to be denied.
14. 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.
15. It was SEG's burden to prove that all feasible mitigation measures had been incorporated in the proposed development.
16. 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.
17. Rather, CZM explicitly declined to address aspects of SEG's proposed development that would clearly have an impact on CZM's specific jurisdictional duty under 12 V.I.C. § 910(a)(2)(B).
18. Among the terms and conditions imposed by CZM upon both permits, was a statement that if trimming of mangroves is required the Permittee must obtain a permit from the Department of Planning and Natural Resources/Division of Fish and Wildlife.

19. 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, SEG appeared to indicate that the planted mangroves would be trimmed as a low hedge.
20. 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.
21. 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.
22. Noting the possibility that SEG'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).
23. However, no such analysis was undertaken as confirmed by the record before CZM.
24. Though CZM disregarded this issue at the time it made its decision, in defending its decisions before the BLUA, CZM argued that the mangroves were new plant life being

planted by SEG and, therefore, the fact that SEG intended to trim those mangroves as a low hedge was irrelevant.

25. In as much as the planting of mangroves was being cited by SEG as an environmental benefit of the development, the fact that SEG was simultaneously intending to trim those planted mangroves as a low hedge was clearly highly relevant.

26. Moreover, SEG expressing a pre-meditated intent to plant a mangrove and simultaneously damage that mangrove's function and integrity merely for SEG's aesthetic purposes clearly constitutes a violation of one of the basic and mandatory goals of 12 V.I.C. § 903(b)(8).

27. 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 NOAA.

28. NOAA, in turn, expressed concerns over the environmental impact of the proposed marina.

29. Actually, NOAA had expressed concerns about proposed plans for an earlier, smaller version of the proposed marina and was no less concerned after SEG had revised its plans to make the marina *even larger*.

30. In response to a request from CZM for commentary, NOAA 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."

31. Unlike CZM, NOAA listed fifteen different additional pieces of information, studies, data, and surveys that would be required for SEG, noting that even with that information once the federal Endangered Species Act consultation began, additional information may also be required.

32. 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?

33. This is virtually the same question CZM is statutorily compelled to ask 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).

34. It should also be noted that SEG's development clearly involves filling and dredging of submerged lands as it requires the installation of over one hundred pylons into the submerged lands, which requires the removal of sea grass for each such pylon, as well as a set of wide, opaque piers and walkways connecting those pylons, which (combined with the mega yachts to be moored along those piers and walkways) deprives the underlying sea grass of light – a situation that the National Oceanic and Atmospheric Administration ("NOAA") indicated would kill acres of sea grass under the development.

35. Whether one kills all sea grass below one's development by dredging it, filling it, or depriving it of light (via targeted dredging to install pylons), the result is the same.
36. The only alternatives identified by SEG were the possibility of no development whatsoever and identification of alternative sites that were unavailable or less appealing *for a marina of the size proposed.*
37. 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 SEG in response to an earlier, smaller version of the proposed development.
38. Rather than answer that question from NOAA, SEG proposed an even bigger marina.
39. At numerous points in the Water Permit application, SEG made statements regarding alleged improvements to be achieved based upon alleged existing negative environmental factors.
40. SEG provided no evidentiary support for the existence of those alleged existing negative environmental factors.
41. By citing potentially *non-existent* "existing" negative environmental factors, SEG describes the proposed development, at times, as actually constituting an environmental mitigation effort rather than a commercial development, resulting in a net environmental benefit to Coral Bay.
42. For instance, SEG makes conclusory statements regarding damage to sea grass caused by existing mooring boats and boats routinely utilizing two anchors, causing damage to sea grass.

43. However, in her letter to Director Oriol, Sharon Coldren, President of the Coral Bay Community Council, indicated these conclusory statements were false.

44. CZM required no evidence from SEG to establish that these alleged negative existing environmental factors actually existed.

45. Moreover, in disregard of its obligation to consider lessening environmental impacts, and considering alternatives, CZM did not require SEG to address the simple solution of installing a reasonable number of moorings to replace anchors, without inclusion of a massive marina.

46. 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.

47. This mass destruction was simply disregarded by CZM.

48. The environment is also endangered by the prospect of damage to the proposed marina as a result of tropical storms and hurricanes.

49. Sharon Coldren noted before CZM 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.

50. 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.

51. 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 (such as gallons and gallons of fuel) directly into the sea grass as they are broken upon those slips and docks.

52. In fact, as SEG's proposed marina is specifically designed to be marketed to "mega yachts", the amount of toxic substances would be far greater in such large vessels.

53. Coldren also noted to CZM that insufficient space was provided for maneuvering vessels of the size proposed by SEG, increasing the likelihood of collisions and the release of toxic substances as a result of damage to the vessels.

54. However, CZM required no further evidence from SEG establishing the location was safe for mooring substantial numbers of large yachts, and simply disregarded this important testimony.

55. Many members of the public submitted letters to CZM emphasizing the exposed nature of the proposed marina location, including members of the public with clearly extensive nautical experience.

56. One commenter had circumnavigated the world on a sailing vessel. Another was licensed to operate 50 ton seagoing vessels.

57. 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.

58. 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 SEG'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.

59. If SEG 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.

60. Whether *any* marina placed in *that* location would be safe in a high category hurricane is irrelevant.

61. 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.

62. SEG clearly failed to satisfy its burden of proof with respect to the establishment of mitigation measures and thus any finding by CZM that SEG had done so was clearly arbitrary and capricious.

63. 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.)

64. Clearly, the V.I. Code mandates that CZM do far more than "cross its fingers and hope" that a developer has met the goals, policies, and standards required of CZM applications.

65. The V.I. Code requires CZM to make a finding that the requisite goals, policies, and standards have been met and satisfied, failing which the application must be denied.

66. In the course of making that finding, CZM must require of SEG any and all evidence, studies, and reports necessary to confirm that the relevant goal, policy, or standard has been met and satisfied.

67. In this case, CZM had no basis for such a finding and disregarded the key issues raised by all those who opposed the application.

68. 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.

69. It is thus particularly shocking that CZM disregarded the warnings of numerous members of the public, who questioned SEG's ability to complete the project as proposed – SEG's financial wherewithal to see to completion this massive proposed marina.

70. One member of the committee questioned SEG at the public hearing as to whether SEG possessed sufficient financing to complete the development, to which SEG purportedly responded, simply "yes."

71. Apparently satisfied with this non-evidence of the sufficiency of SEG's financing, CZM asked no further questions of SEG on the subject.

72. Given the massive cost for the development identified by SEG itself, this was inexcusable.

73. SEG's Market Study, Feasibility and Economic Analysis noted 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)).

74. SEG proceeded to describe a U.S. Fish and Wildlife Service Boating Infrastructure Grant of $1,300,000.00.

75. SEG concluded: "[t]he St. John Marina is well funded to get through the permitting process."

76. With respect to the alleged $1,300,000.00 grant, SEG provided CZM with 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.

77. However, the letter stated explicitly that only $255,000.00 is authorized to be released to secure permits and to conduct environmental and biological studies to determine impacts.

78. It also stated specifically that the remaining funds were only to be released upon submission and approval of the required compliance documents.

79. Moreover, the letter stated that the grant was for the period of October 1, 2013 to September 30, 2014.

80. In other words, at the time CZM voted to approve SEG's permits on October 1, 2014, the grant had already expired and SEG had provided no evidence that the remaining grant funds had been released, that SEG's compliance documents had been approved, or even that SEG had submitted its compliance documents at all.

81. The only evidence of funding, other than that letter from the Department of the Interior regarding the release of $255,000.00, is a single letter.

82. However, that letter provides no evidence of actual funding.

83. SEG's sole piece of evidence regarding financing other than the grant letter was 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.

84. Neither the letter of intent nor the company nor the content of the letter were referenced at any point in the actual text of SEG's Market Study, Feasibility and Economic Analysis.

85. Rather, the letter was appended to the end of the report as an apparent afterthought.

86. 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.

87. 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 financing, much less evidence of tens of millions of dollars in financing.

88. 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).

89. However, apparently convinced by the serpentine nature of the financing entity's name 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 before CZM.

90. 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 federal grant and the obscure and unenforceable letter of intent as SEG's evidence of financing, CZM had in its possession an August 11, 2014 letter from the primary developer that designed the entire marina project for SEG, Applied Technology & Management, Inc. ("ATM"), alerting CZM that SEG "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."

91. Moreover, the letter stated explicitly that, pursuant to Articles IV and VII of the Professional Services Agreement dated January 10, 2014 between SEG and ATM, "[i]n light of [SEG's] failure to pay, ... [SEG'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 [SEG] at any public hearings or decision meetings relating to the proposed project."

92. SEG 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."

93. SEG 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.

94. Likewise, with respect to the revocation of their right to use ATM's plans, reports, and other materials, SEG assured CZM that the contract was silent as to ownership of documents, drawings, plans, reports or other materials created by ATM.

95. However, on August 15, 2011, ATM replied (to a letter apparently sent by SEG'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 SEG's payment of the funds owed within that seven day period.

96. 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.

97. The record below reveals no inquiry by CZM regarding this situation, though it goes to the heart of the question of whether or not SEG is capable of completing the proposed development.

98. It must be remembered that though SEG assured CZM that the Professional Services Agreement between SEG 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.

99. As a result, CZM had no evidentiary basis for accepting that unsupported, conclusory statement from SEG 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.

100. Rather, CZM was faced with a record that suggested great uncertainty as to whether SEG had the right to use those plans at all, yet it failed to make any findings on this crucial point.

101. Even assuming SEG'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 SEG continued to have the right to utilize those documents and materials.

102. Rather, it describes the potential subject matter for future litigation between SEG 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 SEG being permitted to utilize those documents, drawings, plans, reports or other materials to proceed with the proposed development.

103. In fact, though ATM's original August 11, 2014 letter was addressed to SEG itself, judging by ATM's August 15, 2014 follow up letter, it is sent in reply to a letter not from SEG but rather from SEG's attorney and immediately proceeds to cite specific contract provisions in response to whatever legal argument was presented in the undisclosed letter by SEG's attorney.

104. In short, CZM was on notice on or about August 15, 2011 that SEG 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.

105. If, as SEG's primary contractor stated to CZM, SEG 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 SEG's application.

106. Moreover, ATM is the only part of SEG's design group that actually has any experience with respect to designing or implementing marinas.

107. 44 of the 66 page qualifications portion of SEG's permit application package is dedicated to the experience and qualifications of ATM.

108. 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.

109. However, neither Bioimpact, Inc. nor Cairone & Kaupp, Inc. offer themselves as qualified to design or implement a marina.

110. At no point in either company description is any reference made to design work or implementation work for a marina.

111. Bioimpact, Inc.'s expertise may be relevant to the question of the environmental impact of SEG'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.

112. 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 SEG's proposed development with any relevant experience with respect to designing or implementing marinas.

113. If SEG no longer has the right to use ATM's plans and work product, SEG stands before CZM with literally no plans for the proposed marina and no expertise or experience in designing a marina.

114. However, CZM disregarded this fact, and the fact that SEG 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.

115. In doing so, CZM also disregarded this clear sign indicating that SEG lacks the financial wherewithal to complete this massive proposed development, which will require, by SEG's own estimate, thirty-five million dollars.

116. SEG, knowing that losing the services of its primary contractor and marina designer could impact SEG's ability to effectively present its permit application in the public hearing before CZM, was 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.

117. Though the amount of arrearage was only approximately 1/700th of the $35,000,000.00 proposed cost of the development, SEG'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 SEG was in a financial position to complete the proposed development.

118. Though SEG 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 SEG 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.

119. Notwithstanding these facts, CZM granted the permits just the same.

120. 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 SEG'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.

121. 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.

122. Though CZM clearly recognized that the road access to Coral Bay was limited, justifying CZM's requirement that SEG 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 SEG's development.

123. Moreover, CZM failed to acknowledge the fact that "tentative approval" from a political appointee may not be utilized to satisfy SEG's duty to present an actual road permit to CZM.

124. In addition, though SEG included a Traffic Impact Study, it was limited solely to vehicular traffic on the public roads.

125. It made no mention and did not attempt to make any representations regarding the impact of the proposed development on traffic within the waters of Coral Bay Harbor.

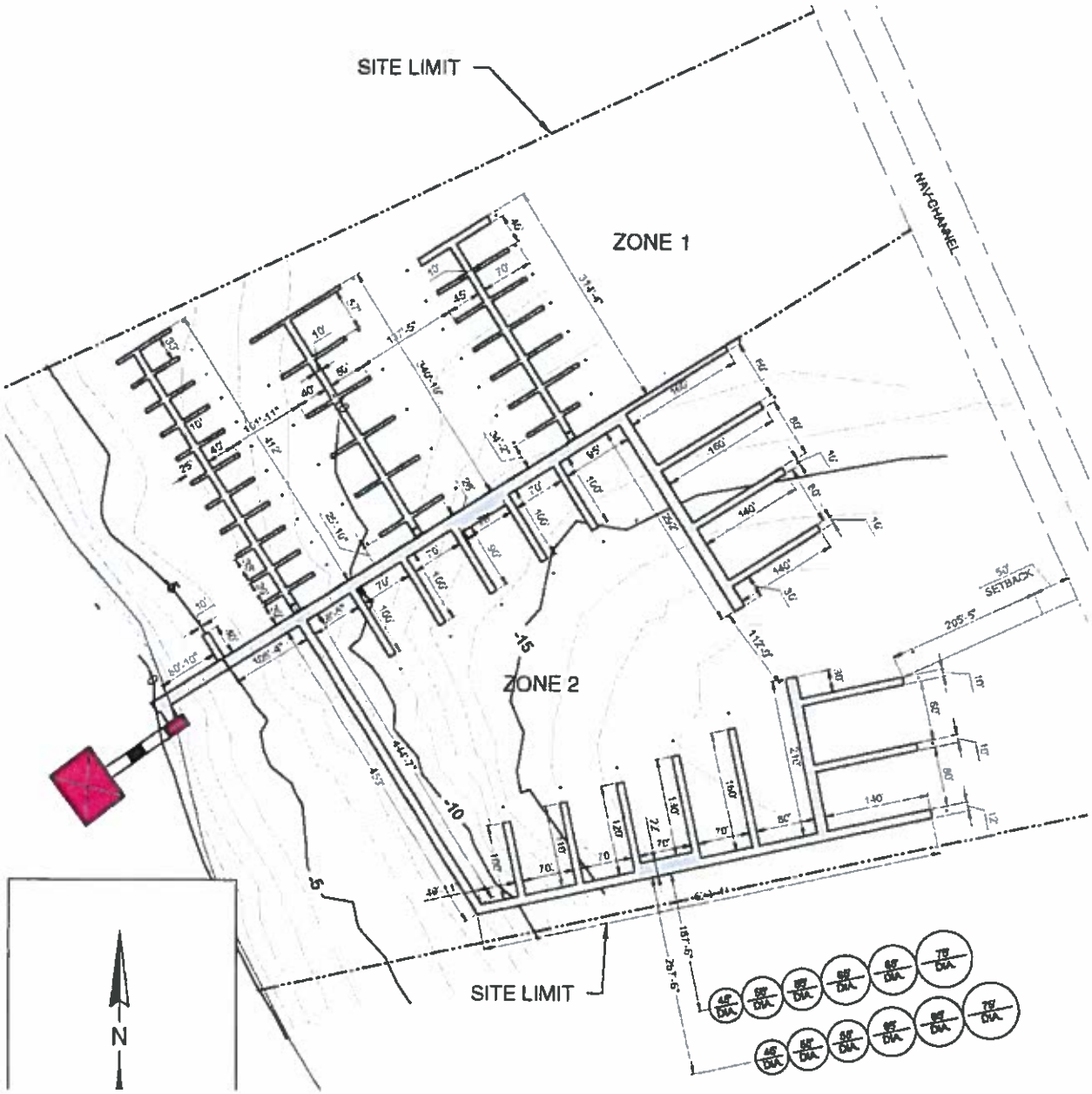
126. In as much as the development is, first and foremost, a marina, the omission of any study or report regarding the impact of the proposed development upon traffic in Coral Bay Harbor represents a glaring omission on the part of SEG, which implicates not only issues of the impact upon the public and 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.

127. Though the application described the length of slips and the length of boats and yachts that can be accommodated by the respective slips, the application at no point described what depth of water was required for any of these vessels – not even for these "mega yachts" of anywhere from 121 to 225 feet in length.

128. Likewise, the application provided no information regarding the amount of space required to maneuver these massive vessels into the proposed slips.

129. However, the diagram depicts a footprint for the marina that stretches deep into and over the navigable waters of Coral Bay Harbor.

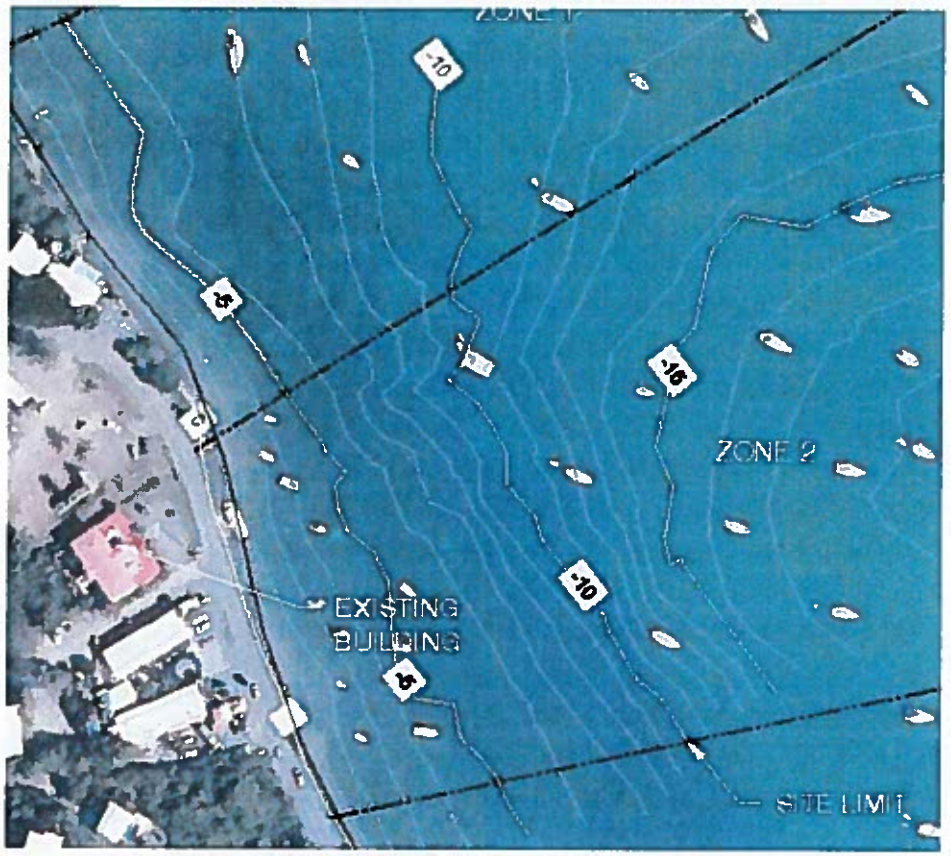
130. Though SEG provided CZM with a diagram of its proposed development that depicted a series of straight lines to the east, which SEG had entitled "nav. channel," SEG had provided no actual evidence that the area of water covered by that unusually straight line was actually navigable.



131. Moreover, when that footprint is viewed in the context of the entire Coral Bay Harbor, the idea that this unusually straight line actually depicts an area of navigable water becomes even more questionable.

132. In fact, that same diagram depicts that alleged lane of navigable water extending straight to the shore as though a single step from the land would plunge into 15 feet of water.

133. 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.

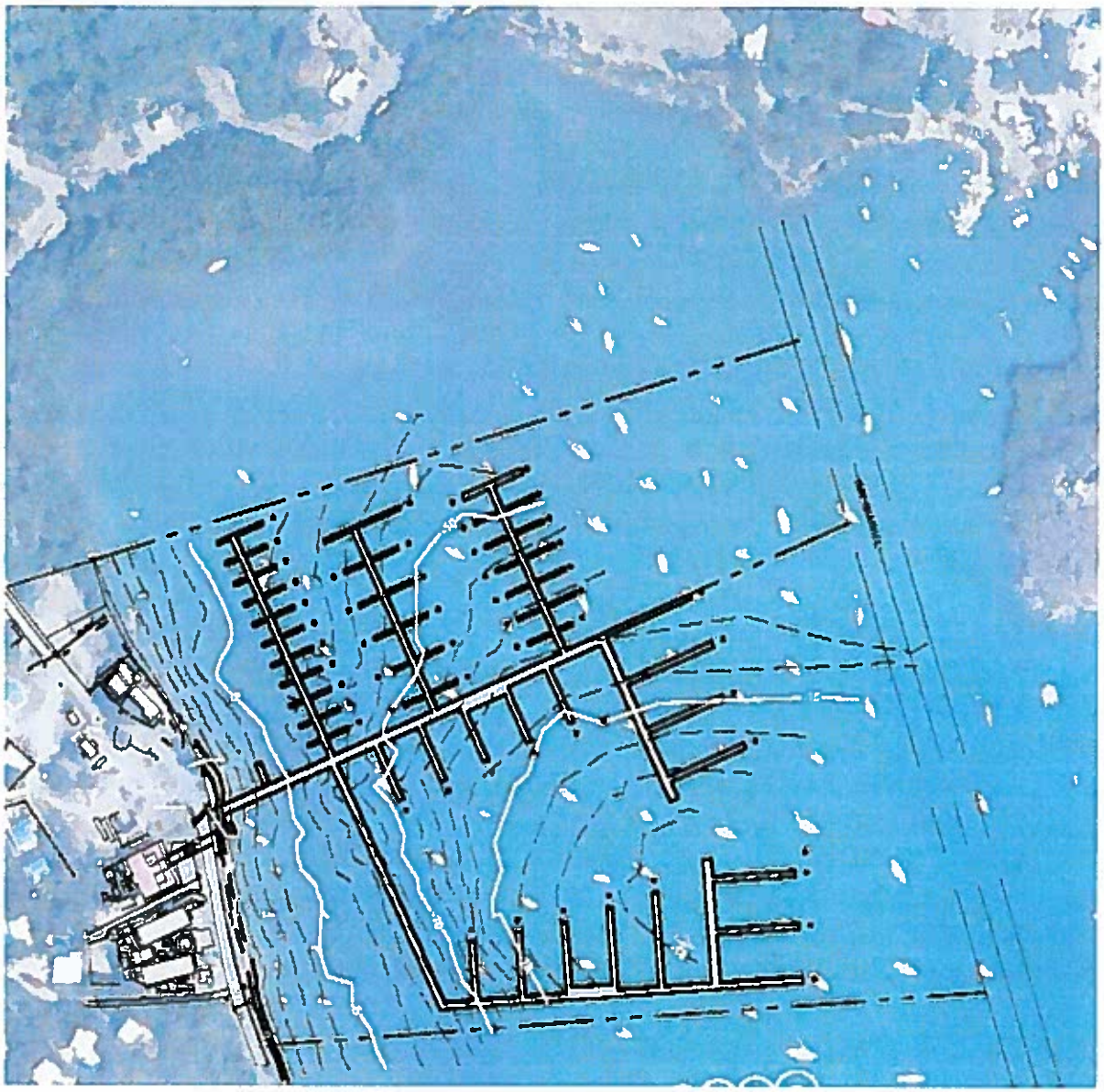


134. Notably, no evidence was offered that the supposed "nav channel" was actually a recognized or approved navigation channel, so designated by any agency with regulatory authority to do so.

135. 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 SEG's shoreline than this, and that placing an imaginary "nav channel" where it suited SEG to site that crucial water passage, was no more than a self-serving deception.

136. In fact, Exhibit A to SEG's legal counsel's August 11, 2014 letter to CZM, showed 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.

137. 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.



138. 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."

139. 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") was based upon no evidence whatsoever and thus was clearly arbitrary and capricious.

140. 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).

141. 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.

142. At the public hearing, and in written submissions 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.[1]

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[1] 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

143. The clear impact of SEG, 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.

144. This was documented not only in testimony, but in a graphic presented by the Moravian Church showing the overlap of SEG's marina over and into the very area where the Moravian Church's substantially smaller proposed marina would be located, effectively leaving no space for the Moravian Church's plans.

145. Specifically, the Moravian Church submitted to CZM legal authority on its rights as a nearby waterfront property owner.

146. The Moravian Church demonstrated that the size and scope of SEG's marina development would interfere with the rights of the Moravian Church and its tenant to access, and wharf out over, the water adjoining their land.

147. The Moravian Church submitted significant legal authority to CZM in support of its objections based upon SEG's encroachment into the Moravian Church's (and other littoral property owners') littoral and riparian rights.

148. In addition to the factual submissions and legal argument regarding littoral and riparian rights raised by 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 report to CZM regarding the subject.

149. 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.

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time on the design and development of a marina at the Church's property, and had already conducted pre-filing meetings with CZM.

150. 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.

151. 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.

152. In a letter to CZM from SEG's legal counsel, the arguments regarding littoral and riparian rights raised by the Moravian Church were dismissed out of hand, citing a drawing clearly based upon the diagram mentioned above, with a similar straight line depiction of navigable waters stretching from the open ocean straight to the land.

153. However, as noted above, 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.

154. 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 SEG's proposed development.

155. 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 littoral property owners further to the east.

156. SEG's counsel was also dismissive of making reference to riparian rights with regard to the littoral rights of coastal property owners.

157. In reality, "riparian rights" is a term that is also used with respect to the rights of littoral property owners.

158. They deal with the equitable distribution of the access and use of navigable waters amongst riparian and littoral property owners.

159. As dismissive as SEG 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 SEG'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.

160. SEG took the northernmost boundary line of the northernmost of its parcels and extended that boundary in a straight line (as far as SEG chose to go) into Coral Bay Harbor, apparently claiming that as SEG's littoral right.

161. 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 SEG's surveys.

162. Similarly, SEG took the southernmost boundary of SEG's southernmost parcel and extended that boundary in a straight line (as far as SEG chose to go) into Coral Bay Harbor.

163. 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.

164. 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.

165. 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.

166. In this case, the shoreline is a relatively narrow bay or cove and concave in shape rather than straight.

167. Likewise, even if the shoreline was perfectly straight, and it clearly isn't, the boundary lines utilized by SEG are not in a right angle to the coast, resulting in the strange trapezoidal shape of the proposed development.

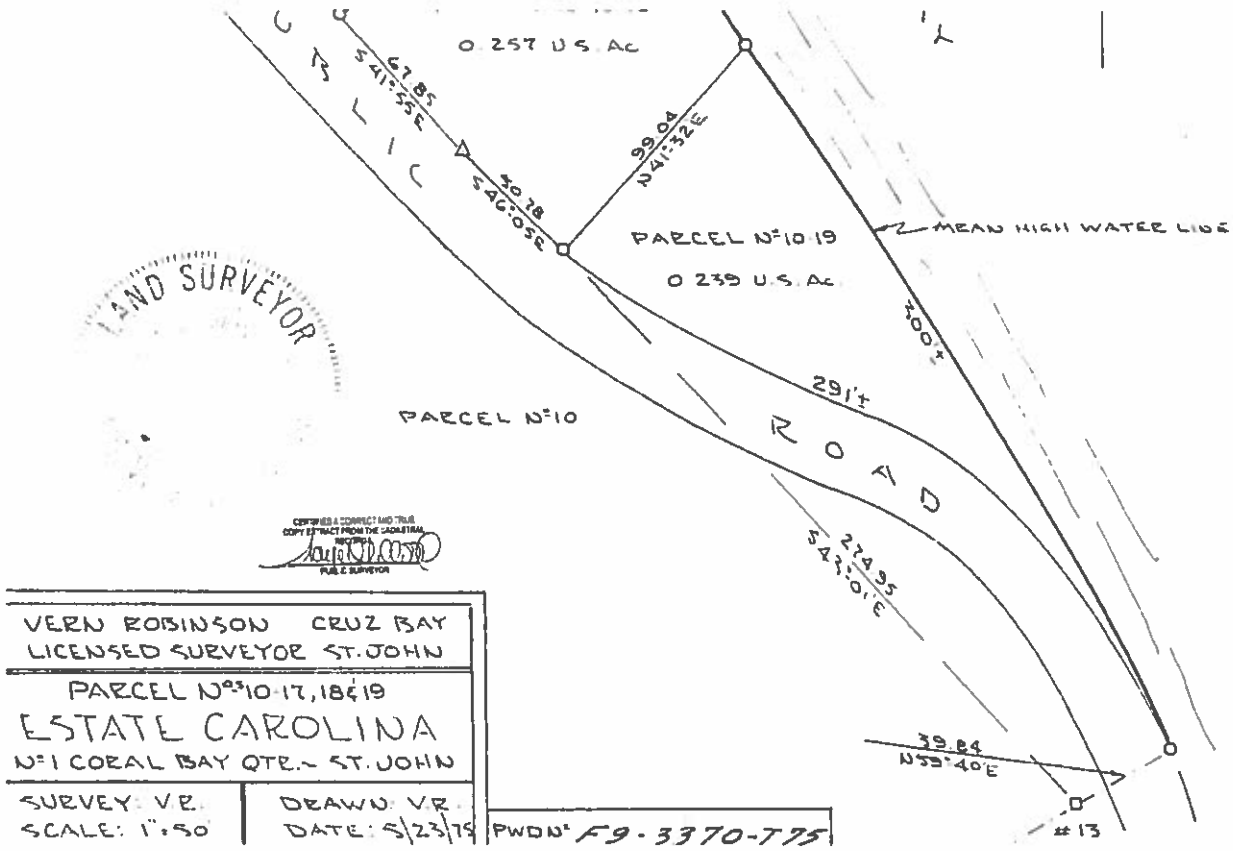
168. Most troubling of all, is the fact that the southernmost boundary of the footprint of the proposed development does not actually extend from the southernmost boundary of SEG's southernmost parcel.

169. As noted above, while surveys of the footprint of the proposed marina clearly indicate the basis for SEG's northern boundary for the proposed marina footprint, those surveys do not indicate the basis for SEG's southern boundary for the proposed marina footprint.

170. In reality, the basis for that southern boundary is Parcel 10-19 as depicted with a red highlight (applied by SEG or its contractor) in SEG'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 SEG owns or controls.

171. From the end of that strange tail, SEG produces the southern boundary of the footprint of the proposed development deep into Coral Bay.

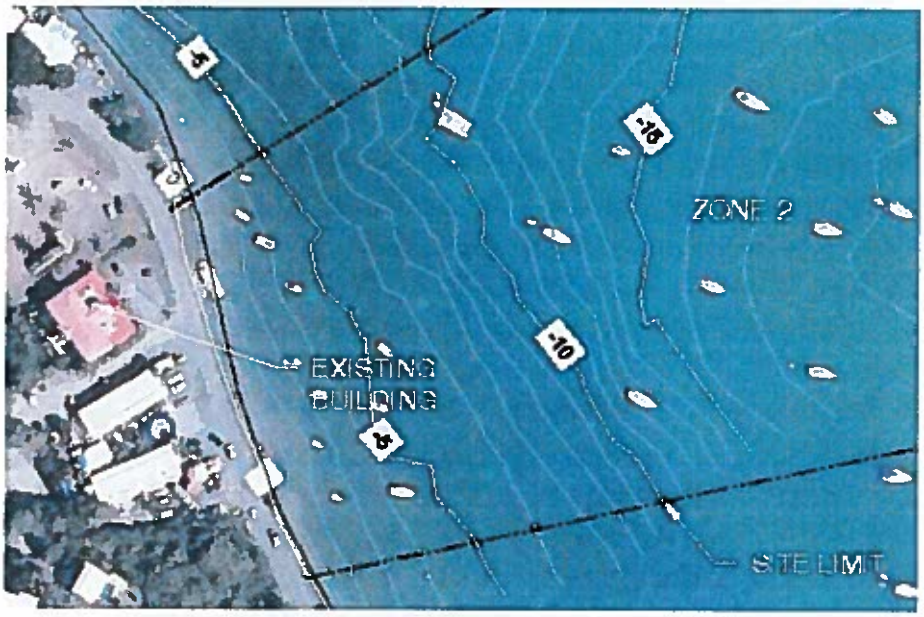
172. However, the actual Public Works Map submitted by SEG itself for Parcel 10-19 clearly depicts the parcel ending at the point the road first reaches the Coral Bay coast. *See* F9-3370-T75.



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

174. In reality, the point at which Parcel 10-19 actually ends is approximately 400 feet north of the point at which SEG begins drawing the southern boundary of its proposed marina footprint.

175. 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 SEG.



176. The Parcel to the south of that strange tail in the Adjacent Property Owner Key Map is not identified by SEG, though SEG was required to identify neighboring property owners within 150 feet.

177. 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 SEG, 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.

178. 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.

179. Even if the approach utilized by SEG was not clearly improper in a concave bay or cove with parcels with boundaries that are not 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 SEG placed it, clearly renders the proposed development an improper and inequitable means of distributing the littoral rights of the various adjacent property owners.

180. 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.

181. 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.

182. This Board should not have countenanced the destruction of the historic rights of the Moravian Church to equitable rights as a littoral property owner, by the summary approval of a vastly over-sized and poorly sited marina in Coral Bay.

183. 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).

184. 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).

185. 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.

186. 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 and preventing the Moravian Church and other littoral property owners from enjoying their littoral property rights.

187. CZM's decisions were unsupported by and contrary to the evidence, clearly erroneous, arbitrary, capricious, and an abuse of discretion.

BLUA Decision

188. During the administrative appeal of CZM's actions, the BLUA granted SEG's amended motion to intervene, though it was filed less than ten days before the scheduled hearing.

189. SEG originally sought to intervene pursuant to 12 V.I.R.R. § 914-17, but its motion was untimely.

190. SEG then filed an amended motion to intervene as an *amicus curie* pursuant to 12 V.I.R.R. § 914-9.

191. BLUA's decision to permit SEG, an interested party and in no way a "friend of the court" but rather a friend of itself, to intervene less than ten days before the scheduled

hearing, and at that time to raise new contentions and arguments in its own favor, was a clear abuse of discretion.

192. BLUA affirmed the decisions of CZM without providing any evidentiary or legal basis or justification for its decision, or any explanation for its failure to address any of the critical issues and defects in proceedings raised by Petitioner.

193. Instead, BLUA simply stated in a conclusory manner and without any discussion or analysis, that 1) it concurred with CZM and 2) it was unpersuaded by the appellants' arguments.

194. To the extent that BLUA members expressed any purported basis for the decision to dismiss the appeal, during the hearing, they stated the arbitrary and capricious, and legally erroneous, position, that Petitioner could not properly oppose the CZM permit, because its interest in constructing a marina on its own property created a "conflict of interest".

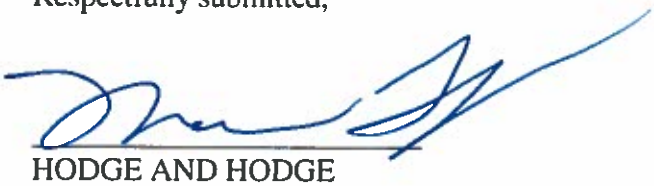
195. For the reasons stated above, CZM's decision was erroneous and thus BLUA concurring in that decision was likewise erroneous.

196. The one and only argument raised by the appellants that BLUA actually addressed resulted in BLUA's conclusion that SEG's Land Permit and Water Permit should be consolidated.

For all of the foregoing reasons, the decisions of CZM and BLUA should be reversed, SEG's Land Permit and Water Permit should be vacated and withdrawn, and CZM should be ordered to deny SEG's applications for the Land Permit and Water Permit.

Dated: July 20, 2016

Respectfully submitted,



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