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MEMORANDUM

TO: Honorable Janette Millin Young
Chairperson, Committee on Economic
Development, Agriculture & Planning

FROM: Yvonne L. Tharpes *YLT*
Deputy Chief Legal Counsel

SUBJECT: Minor Coastal Zone Permit No. CZT-12-14W

DATE: June 3, 2015

This memorandum is a brief Analysis of Minor Coastal Zone Permit No. CZT-12-14W. This Permit was issued to Black Magic Flightops, LLC by the Commissioner of the Department of Planning and Natural Resources on April 9, 2015. Section 2 of the Permit authorizes the Black Magic Flightops, LLC to continue the use and occupancy of a 50' by 5' dock located seaward of Parcel No. 8-5B and 8-6, Estate Nazareth on St. Thomas.

The Permit is a minor permit rather than a major permit. Title 12 V.I.C. § 910 (c) establishes standards for determining whether a coastal zone development is a minor or a major project. To comport with the standards for a minor permit, a development must be completely or substantially seaward of the line of mean high tide and must be designated by section 910 (e) and the associated rules and regulations as a minor permit activity.

The existing dock meets the requirements for a minor permit under 12 V.I.C. §910 (c) (1) inasmuch as it is a development that is substantially seaward of the line of mean high tide and has been designated in 12 VIC § 910 (e) (5) and the regulations of the Virgin Islands Coastal Zone Management (CZM) Commission 12 V.I.R.&R §910-1 (b) (4) (CVIR 12-021-91000A7010-1(b)(4)) as a small pier requiring only a minor permit. Moreover the CZM Commission's regulations defines "pier" as "a structure of timber or other material built onto **or over** the trust lands or other submerged and filled lands" and "small pier" as "a pier which does not exceed **80 feet in length**, is not closer than 30 feet to an adjacent pier, does not exceed 500 square feet, **and whose use is private.**

The Minor EAR in section II briefly describes the intended use of the pier as for the property-owners' water access the home. Under CZM law, an Environmental Assessment report ("EAR") is an informational report prepared by the permit applicant which must be considered by the CZM Committee before it approves or disapproves a coastal zone permit application. **12 V.I.C. §902 (n)**. An EAR must include detailed information about the effects that a proposed development is likely to have on the environment. *Id.*

The letter of Application Dated December 30, 2013 to then Commissioner, Alicia Barnes from Maria Tankenson Hodge, Esquire, stated that the purpose of the application is to allow the homeowner to continue to use his dock for access to his home by his motor boat or by visiting guests who might arrive by boat. Neither EAR nor the application documents indicate the size or number of vessels intended to occupy the dock area or adjacent submerged land. **Your Committee may wish to inquire of the applicant and DPNR officials details about the vessels using the dock.**

The permit does not authorize any development. The previous permit, CZT-593-W, which expired January 31, 2014, authorized the expansion of the 50' pier 30' in length and 5' in width. Inasmuch as the Permittee did not expand the dock, the authority to perform such development expired pursuant to 12 V.I.C. §910 (d) (7), which provided: "Any development or construction approved by a coastal zone permit shall be commenced within twelve months from the date such permit is issued. Failure to commence development or construction within such period shall cause the permit to lapse and render it null and void unless an extension is granted by the appropriate Committee of the Commission or the Commissioner. As the Permittee indicated in its Environmental Assessment Report (EAR), and application documents, the Permittee has no intention to expand the dock.

The term of the permit is set forth in section 3 of the Permit. The Permit is issued to Black Magic Flightops, LLC for a term of 20 years. Section 3 correctly recites that the Permit shall be renewed only if the requirements of title 12 of the Virgin Islands Code, section 911 are met. However, section 3 also contains a misstatement of the law: "The Permittee shall have the option to renew the permit ninety (90) days before the permit expires." and *the terms are subject to negotiation.*" (Emphasis supplied)The foregoing statement is inconsistent with the requirements of the CZM Act.

The terms of the permit are not negotiable. The CZM Act, under 12 V.I.C. §911 (b) (2) places the burden on the applicant to demonstrate that the application for the renewal meets the requisite criteria established in section 911. Moreover, the CZM Committee must deny a permit application unless it finds that the development or occupancy of the submerged lands meets all seven requirements enumerated in section 911 (c). **DPNR should modify the Permit to eliminate**

the misstatement of the law. The Committee may wish to inquire of DPNR officials about the legal authority for such provision.

Section 4 of the Permit sets forth the documents that have been incorporated into the permit by reference. Under the CZM Act, “documents incorporated by reference” are those documents identified in a coastal zone permit which are required to clarify the terms of the coastal zone permit or to facilitate carrying out the intent of the CZM Committee or the Commissioner of Planning and Natural Resources. **12 V.I.R. &R. § 910-10 (2)**. The documents incorporated into Coastal Zone Permit CZT 12-14W by reference include:

1. Letter of Application to the Commissioner dated January 24, 2014’
2. Joint Army Corps/DPNR Application dated January 24, 2014;
3. Minor Environmental assessment Reports stamp-dated December 26, 2014
;
4. Drawing, including a location map, site plan elevation and cross reference section dated December 17, 2014.

Section 5 of the Permit sets forth general conditions. The permit contains all of the General Conditions mandated by 12 V.I.R&R §910-10.

Section 6 sets forth seven special conditions. Pursuant to section 6 the structure is approved for private use only, but no live aboards are allowed. Handling of petroleum products, use of boat propellers for channel clearance, dredging are strictly prohibited. Additionally, section 6 provides that no boat scrapings, wastes, debris, petroleum products or other pollution matter shall be deposited in the waters on the shoreline.

The EAR is devoid of any information on mitigation measures in the event of accidental spills of petroleum products from any vessel using the dock. The CZM Act requires that

before a permit is issued the applicant must demonstrate that any adverse consequences of the development or occupancy will be mitigated. **You Committee may wish to inquire whether mitigation measures were proposed or considered concerning accidental spills from vessels.**

Section 7 of the Permit assesses a rental fee of \$1000 per year, which will be adjusted in accordance with the increases in the Consumer Price Index after the first five years of the Permit, according to a formula set forth in paragraph B i-iii, but the fee may not be adjusted below the \$1000. Then according to paragraph C of section 7, before the commencement of the 11th year of the Permit, DPNR and the Permittee will renegotiate the fee. Failure of the Permittee to negotiate will result in an automatic adjustment of the fees by 25%.

It is unclear as to what happens with the rental fee between the period after adjustment after the fifth year and the renegotiation of the fee “prior to the commencement of the eleventh (11th) year of the term of the permit”. Also perplexing is the lack of information on what happens with the fee adjustments after the eleventh year negotiation. There is no language in section 7 indicating whether after the five-year initial fee adjustment, the fees will be adjusted each year thereafter. Nor is there any indication that after the eleventh year there will be any yearly fee adjustments.

Under the 1993 permit, the Permittee paid an annual fee of \$1000. The Black Magic Flightops Permit does not contain an explanation as to how the fees were derived. Subsection (e) of 12 V.I.R.&R. §910-5 commands the Commissioner of Planning and Natural Resources to negotiate reasonable fees with Permittees based on the fair market value of the land or improvements, gross receipts of commercial operations and other pertinent factors. Moreover, §910-5 (e) mandates that the weight given to the criteria used to derive the rental fee “shall be attached to the lease or permit”. Inasmuch as the weight of the criteria used in determining the rental fee is not attached to the permit, section 7 of the permit is inconsistent with the CZM Act.

The Committee may wish to inquire of the DPNR officials about how the fees were determined and how the fee adjustment formula works.

Title 12 V.I.C. § 910(a) (2) mandates that before The Committee grants a coastal zone permit, the applicant must present certification from the Bureau of Internal Revenue and Department of Finance that the applicant has filed and paid all taxes, penalties, and interest and from the Office of the Lieutenant Governor, certification that the applicant has filed its required annual report or has satisfactorily made agreement to pay the taxes or file the required reports. The CZM file transmitted by the Office of the Governor to the Legislature contains a property tax clearance from 2010. **Your Committee may wish to inquire about the status of the applicant's property tax payment. Moreover, title 12 V.I.C. §902 (n) needs to be amended to be consistent with the current property tax collection laws.**