



Office of the  
Legislative Counsel

# The Legislature of the Virgin Islands

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October 13, 2009

## MEMORANDUM

**TO:** The Honorable Adlah "Foncie" Donastorg, Jr.  
Senator, 28<sup>th</sup> Legislature of the Virgin Islands

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

**RE:** Development along the shoreline at the Legislature

RECEIVED  
OFFICE OF  
ADLAH A. DONASTORG  
SENATOR  
09 OCT 14 AM 11:21

This memorandum is in response to your e-mail about the beach development and fill activities along the shoreline at the Legislature. You are correct the Legislature is in violation of both Virgin Islands and federal law for the beach "nourishment/forestation" activities recently commenced along the shoreline of the Legislature's premises. This illegal project will not only subject the Legislature to serious civil and criminal penalties, but will have negative impacts on the environment and ecosystem. The earth change activities and fill of the shoreline and with sand are a clear violation of the Coastal Zone Management Act. The deposit of fill material into the navigable waters of the Virgin Islands violate the local and federal water pollution control acts.

The Virgin Islands Coastal Zone Management Act is applicable to the Legislature and the Legislature's property. The Coastal Zone Management Act 12 V.I.C., §§ 910 (a) and (11) (a) in pertinent part respectively provide: "[A]ny person wishing to perform or undertake any development in the first tier of the coastal zone. . . shall obtain a coastal zone permit in addition to obtaining any other permit required by law from any public agency prior to performing or undertaking any development, and "[n]o person shall develop or occupy the trust lands or other submerged or filled lands of the United States Virgin Islands without securing a coastal zone permit which includes, in addition to the elements of a section 910 permit, a permit or lease for the development or occupancy of the trust lands or other submerged or filled lands.

The term "person" for purposes of section 910 and 911 means any individual, organization, partnership, association, corporation or other entity, including any utility, *the Government of the United States Virgin Islands, the Government of the United States, any*

*department, agency, board, authority or commission of such governments*, including specifically the Virgin Islands Port Authority and the Virgin Islands Water and Power Authority, *and any officer or governing or managing body of any of the foregoing* 12 V.I.C., §902 (v). Under section 902 (l) , “development is defined as meaning “the *placement, erection, or removal* of any *fill*, solid material or structure on land, in or under the water; discharge or disposal of any dredged material or of any liquid or solid waste; grading, removing, dredging, mining, or extraction of any materials, including mineral resources; subdivision of land pursuant to Title 29, chapter 3 of this Code; construction, reconstruction, removal, demolition or alteration of the size of any structure; or removal or harvesting of vegetation, including coral.

The Legislature is required to apply for a major coastal zone permit before a project to develop a sandy beach may be commenced. Moreover, the Legislature would be required to obtain all other applicable permits before commencing the project. To commence any development in the coastal zone without first obtaining a coastal zone permit is a violation of the Coastal zone Management Act.

To be granted a coastal zone permit, a development must be consistent with the goals, objectives and standards of the Coastal Zone Management Act. The Coastal Zone Commission and the Commissioner of the Department of Planning and Natural Resources would be prohibited by law from issuing a coastal zone permit for the development of a beach at the shoreline on the Legislature’s property, because such a development is inconsistent with the objectives and standards of the CZM Act, and as proposed and in the process of being completed, is devoid of any mitigation measures to eliminate adverse environmental consequences of the development. The deposit of the sand along this rocky shoreline of high wave intensity will result in the erosion, runoff and sedimentation of the sand into submerged lands and benthic community. Moreover, the sand might be transported and re-deposited at another beach area and cause adverse impact to those beach areas.

One of the objectives of the Coastal Zone Management Act is to maintain or increase coastal water quality through control of erosion, sedimentation and runoff. See 12 V.I.C. §910 (b)(9). Moreover specific standards for development of the first tier of the coastal zone include the mandates that developments minimize the alteration of natural land forms, assure that filling of submerged lands is clearly in the public interest and ensure that filling of coastal lands is consistent with specific marine environment policies contained in the Coastal Zone Management Act. See 12 V.I.C. §906. The deposit of sand and consequential fill of submerged lands will most likely have adverse consequences on the environment.

This “beach nourishment” project will not work, will not have the intended effect of creating a beautiful sandy beach and recreational area, but will most likely have detrimental environmental effects on the environment. A rocky shoreline cannot be transformed into a sandy beach merely by dumping and compacting sand on the shore. Developing a beach requires coastal engineering and an understanding of beach geology, oceanography, beach nourishment,

reforestation or restoration projects, that is, replacement of sand lost on “natural sandy beaches” through longshore drift or erosion, submersion, has been estimated cost of beach restoration has been estimated at 1 to 1.5 million dollars per mile. It should be noted that this cost is associated with projects on sandy shorelines, not where no such sandy shoreline exists.

To avoid liability and to save the environment, I strongly advise that the Legislature immediately contact DPNR and agree to a corrective action plan to restore the area and mitigate the environmental damage the project has caused.

There is no justification and no defense for this blatant violation of local and Federal law. *See. e.g. Water Island Hotel & Beach Club, Ltd. v. Government of V.I.*, 26 V.I. 276, 764 F. Supp. 1051, 1991 U.S. Dist. LEXIS 13424 (D.C.V.I. 1991)(Defendant could not argue that development was merely a repair). DPNR has already warned the Legislature about performing development without a permit.

Under local law fines can range up to \$10,000 per day of violation. Under federal law, fine can be much more including serious jail time. See 12 V.I.C. §913, which in pertinent part provides:

“When the Commission or Commissioner has reason to believe that any person has undertaken, or is threatening to undertake, any activity that may require a coastal zone permit without securing a coastal zone permit, or that may be inconsistent with any coastal zone permit previously issued, the Commission or Commissioner may issue a written order directing such person to cease and desist. The cease and desist order shall state the reasons for the Commission's or Commissioner's decision and may be subject to such terms and conditions as the Commission or Commissioner deems necessary to insure compliance with the provisions of this chapter including, without limitation, immediate removal of any fill or other material, suspension of the coastal zone permit, or the setting of a schedule within which steps must be taken to obtain a coastal zone permit pursuant to this chapter. Said order shall be served by certified mail or hand delivery upon the person being charged with the actual or threatened violation of this chapter, and shall be effective upon issuance; provided, however, that such order shall grant the opportunity for a hearing.

In addition to any other remedy provided herein or at law or equity, the Attorney General, the Commission or Commissioner may institute a civil action in the District Court of the United States Virgin Islands for an injunction or other appropriate relief, including revocation of a permit issued hereunder, or an order to prevent any person from violating the provisions of this chapter, including occupying or developing the trust lands or other submerged or filled lands, or to enforce any cease and desist order or any regulations issued hereunder.

**(c) Penalties. (1)** Any person who violates any provision of this chapter, or any regulation or order issued hereunder, shall be subject to a civil fine of not to exceed ten thousand (\$10,000) dollars.

(2) Any violation of this chapter or any regulation or order issued hereunder shall constitute a misdemeanor. Any person convicted of such a violation shall be fined in accordance with the provisions of subsection (c), paragraph (1) hereinabove, or imprisoned not more than one year, or both.

(3) In addition to any other penalties provided by law, any person who intentionally and knowingly performs any development in violation of this chapter shall be subject to a civil fine of not less than one thousand dollars nor more than ten thousand dollars per day for each day during which such violation occurs.

(4) In addition to the foregoing and in order to deter further violations of the provisions of this chapter, the Attorney General, the Commission or Commissioner may maintain an action for exemplary damages, the amount of which is left to the discretion of the court, against any person who has intentionally and knowingly violated any provisions of this chapter.”

As I stated before, the Legislature is required to comply with the law.

If you have any additional questions, Please don't hesitate to send me another e-mail.