

5. Venue is proper in this Court pursuant to 4 V.I.C. § 78, as the District of St. Thomas & St. John is the judicial division where the cause of action arose and where Defendants may be served.

FACTS

The Settlement Agreement

6. GSI is the owner of the island known as Great St. James, located within the U.S. Virgin Islands, which is the site of activity in issue.
7. In April of 2016, DPNR issued Notice of Violation identified as NOVA-04-16-STT (“Notice of Violation”) to GSI seeking an assessment of Two Hundred Eighty Thousand Dollars (\$280,000.00) for what DPNR alleged were violations of the Coastal Zone Management Act (“CZM Violations”) on the residential property of Great St. James. **[EXHIBIT A]**
8. GSI contested the alleged violations as unjustified and the assessment as an unprecedented penalty on wholly residential property, both well outside the scope of DPNR’s authority, and negotiations between the parties ensued.
9. On August 4, 2016, in an attempt to resolve the Notice of Violation, so that GSI could proceed with its plans for Great St. James, GSI entered into a Settlement Agreement with DPNR regarding the challenged violations and assessment asserted in the Notice of Violation (the “Settlement Agreement”). **[EXHIBIT B]**
10. As part of the Settlement Agreement, GSI agreed to refrain from further CZM violations, to pay DPNR a fee in mitigation for the disputed violations claimed by DPNR and to pay DPNR the balance of the initial Two Hundred Eighty Thousand Dollar (\$280,000.00) assessment, after deduction of the mitigation fee, in the event of

future CZM Violations which GSJ fails to cure after DPNR provides notice of the same.

11. In order to address the prospect of additional legally and factually deficient determinations by DPNR and further excesses in the exercise of DPNR's assessment authority, GSJ insisted that the Settlement Agreement include notice and opportunity to cure provisions with respect to all CZM Violations that might be asserted by DPNR in the future.
12. Accordingly, the Settlement Agreement provides that in the event DPNR were to seek to claim any violations against GSJ in the future, GSJ could not be assessed for such violations with the balance of the original assessment unless GSJ was first given prior notice and an opportunity to cure any and all such claimed violations. *See EXHIBIT B at Item 3(d).*
13. In exchange for these necessary protections from future overreaching by DPNR, GSJ agreed in the Settlement Agreement to pay and did pay a mitigation fee of Seventy Thousand Dollars (\$70,000.00), a fee much higher than that which previously ever was ever paid for alleged CZM Violations of a similar nature on wholly residential property.
14. The notice and the opportunity to cure provisions therefore were and are a material component of the Settlement Agreement expressly bargained and paid for by GSJ.
15. As is explained below, GSJ's concerns regarding the need for protection from DPNR overreaching were well founded.

The Unauthorized and Unlawful Entry

16. On October 28, 2016, three (3) DPNR representatives, including an armed enforcement officer, Officer Mercer, Jean-Pierre Oriol, Director of Coastal Zone

Management, and Attorney Michele Baker, DPNR Legal Counsel, entered upon Great St. James without prior notice to or approval from GSJ, or any legal authority to do so.

17. DPNR previously issued a minor Coastal Zone Management permit to GSJ in connection with development relating to a certain cistern project (the “Cistern Project”) situated at a discrete location on Great St. James. The express conditions of that permit (the “Cistern Permit”) limit the times during which DPNR may request access to Great St. James, as well as the scope and location of such access. Section V, paragraph 8 of the Cistern Permit provides:

The Commissioner or his authorized agents or representatives shall have the power to enter **at reasonable time during projects work hours** upon any lands or waters for which a Coastal Zone Permit has been issued. The Permittee shall permit such entry for the purpose of inspection and ascertaining compliance with the terms and conditions of said Coastal Zone Management permit.

See EXHIBIT C at Section V, paragraph 8 on page 2.

18. Thus, by the express terms of the Cistern Permit, DPNR was authorized to seek access only at a reasonable time and only during the working hours of the Cistern Project. Moreover, DPNR could request access only for the limited purpose of inspecting the specific site of the Cistern Project and only in order to ascertain compliance at that site with the terms of the Cistern Permit. By the express terms of the Cistern Permit, GSJ is only required to permit such access during those limited times, at that limited site and for that limited purpose. DPNR’s recourse in the event access is denied is to issue a cease and desist order or to commence proceedings to revoke the Cistern Permit in the event it can show that the Permittee violated the conditions of the Cistern Permit (which had not occurred in this case). DPNR is not authorized to disregard the terms of the Cistern Permit or the directives of GSJ’s

representatives and trespass on private property and is statutorily limited by the provisions of Title 12, section 913. ~~{Erika, can we provide statutory back-up here?}~~

19. DPNR sought access to Great St. James on October 28, 2016 at a time when there was no work taking place at the Cistern Project and which was therefore outside of the project's working hours. Furthermore, the time of the access was unreasonable in that it was sought without prior notice when neither the owner nor anyone with knowledge of Cistern Permit was then available to accompany DPNR to the site of the Cistern Project, it disrupted the schedules of GSI personnel, and it interfered with the conduct of their assigned duties.
20. DPNR's representatives were met at the only dock on Great St. James, which effectively serves as the owner's front door, by GSI personnel, who, having been forced to disrupt their schedules and disregard their assigned duties to receive the DPNR representatives, specifically advised the DPNR representatives that the owner was not on the island and that the GSI personnel present had no authority to grant access to the island, and directed DPNR to GSI's office in Red Hook.
21. Nevertheless, over the protests of GSI personnel, and lacking any legal authority whatsoever, DPNR entered onto the premises of Great St. James. Moreover, despite that fact that the express terms of the Cistern Permit limited the location and scope of any permissible access on Great St James exclusively to the site of the Cistern Project for the narrow purpose of ascertaining compliance with the Cistern Permit at that specific site, DPNR traversed the entire island without restriction, claiming to be authorized to conduct an "inspection" of the entirety of Great St. James.

22. This unauthorized entry and unlawful search was particularly egregious in this case because it was conducted with the approval and participation of DPNR's legal counsel. DPNR's Counsel is ethically prohibited from communicating with another party or its representatives without the prior permission of that party's attorney when, as here, DPNR's Counsel knows that party to be represented by legal counsel. Counsel for DPNR made no attempt whatsoever to contact the undersigned legal counsel for prior approval or to notify GSI before the unauthorized entry on Great St. James, the communication with GSI personnel without permission, and the unlawful search.
23. By refusing to comply with the conditions of the permit and conducting an unauthorized search throughout the entirety of Great St. James without prior notice to GSI or its legal counsel at an unreasonable time when neither the owner nor knowledgeable GSI representatives could be present, DPNR, eliminated any opportunity for clarification or discussion at the site giving rise to a series factual and legal errors (more fully described below) by DPNR underlying the instant action.
24. During its unauthorized entry and unlawful search on October 28, 2016, DPNR verbally instructed workers to cease and desist from further activity anywhere on Great St. James. That verbal instruction was confirmed by a written cease and desist order, [REDACTED]-02-16-STT, dated October 28, 2016, that was to be served on counsel for GSI via email and was delivered to GSI's Red Hook office on October 31, 2016 (the "Cease and Desist Order"). [EXHIBIT D]

Erroneous Notice to Cure & the Arbitrary and Unreasonable Cure Period

25. On Friday, November 4, 2016, based on inaccurate observations, unfounded assumptions, and erroneous conclusions of fact and law made during DPNR's unauthorized entry and unlawful search of Great St. James on October 28, 2016, Defendants issued a Notice to Cure Breach of Settlement Agreement (the "Notice to Cure") [EXHIBIT E].
26. In response to GSI's request for an opportunity to review the numerous deficiencies in the Notice to Cure with DPNR, Counsel for DPNR proposed by email that GSI and DPNR conduct an informal meeting with respect to the Notice to Cure to be held on November 16, 2016, which proposal was agreed to by GSI.
27. The Notice to Cure was and is deficient because, among other deficiencies, it improperly attributed violations to Plaintiff where none had occurred and as to matters for which it was readily apparent that GSI bore absolutely no responsibility, failed to adequately specify the basis and nature of the violations claimed or to provide any reasonable description of allowable cures that DPNR required, and provided an arbitrary and unreasonably short cure period, all in clear violation of DPNR's obligations and GSI's rights under the Settlement Agreement.
28. Emblematic, though not an exhaustive list, of alleged violations DPNR improperly asserted against GSI in the Notice to Cure were the following:
 - a. An alleged violation against GSI with respect to four (4) moorings in waters off the shores of Great St. James which for decades or more prior to GSI's acquisition have served as a popular public recreation spot for boaters. These moorings were affixed to submerged land which is not part of Great St. James, and were neither installed nor maintained by GSI, and as such, GSI could in no way be held responsible for them. This indisputable fact was

acknowledged by DPNR at a November 22, 2016 meeting, but only after GSI was forced to expend resources and remove the moorings prior to the expiration of DPNR's unreasonable cure deadline.

- b. An alleged violation with respect to what DPNR claimed was the excavation of approximately three thousand five hundred (3500) square feet to four thousand (4000) square feet of land, which DPNR inaccurately asserted was being prepared for future development. In fact, that site had not been excavated. As is well known by DPNR representatives who had visited Great St. James previously, the area in question was an existing garbage dump site created by the prior owner. As subsequently acknowledged by DPNR's representatives at the November 22, 2016 meeting, this site presented no violations to be cured by GSI.
- c. An alleged violation against GSI with respect to a non-permanent, movable covered picnic table of which DPNR representatives specifically had been made aware during a prior visit to Great St. James, and had correctly not found it to constitute any violation. Under the circumstances, GSI was unable to determine what violation this non-permanent, readily moveable structure could possibly present or what cure DPNR expected of GSI with respect to it.

29. The Notice to Cure unreasonably and arbitrarily demanded that Plaintiff cure the mix of non-existent, inadequately described, and improperly assessed violations alleged in the Notice to Cure within ten (10) calendar days of its receipt, which included five (5) days of weekends and holidays that fell during that ten (10) day cure period, and unilaterally imposed a cure deadline of November 14, 2016 with which it was impossible for GSI to comply.

30. On Monday, November 7, 2016, Plaintiff notified Defendants in writing of the deficiencies in the Notice to Cure, including the arbitrary and unreasonably short ten (10) day cure period, which writing was followed by an email communication on November 11, 2016 **[EXHIBITS F & G]**.
31. Despite the extremely short cure period imposed by DPNR, no response to GSI's communications was received from DPNR until Friday, November 11, 2016, a federal and Virgin Islands holiday on which businesses in the Virgin Islands were closed for the weekend.
32. By email on that date, DPNR, acting outside of the scope of its obligations under the Settlement Agreement, unreasonably refused to grant any extension of time, leaving GSI without an opportunity to review with DPNR the erroneous claims and determine jointly with DPNR a proper course and reasonable timeline in which to proceed. **[EXHIBIT H]**
33. Although it was a local and federal holiday, counsel for GSI responded on that same date with additional valid reasons to support an extension. **[EXHIBIT I]**
34. After the holiday weekend had passed and the cure deadline was upon them, DPNR grudgingly extended its unilateral cure period by a mere four (4) days to November 18, 2016, only two (2) days after the scheduled informal meeting with DPNR on November 16, 2016. **[EXHIBIT J]**
35. Even with the slight extension, the cure period spanned only fourteen (14) days, from November 5, 2016 to November 18, 2016, leaving only nine (9) working days for GSI to complete the vague cures DPNR ultimately demanded, and giving GSI only two (2) days after the scheduled November 16, 2016 meeting with DPNR, during

which GSJ hoped to receive from DPNR the clarification regarding the Notice to Cure GSJ reasonably required in order to properly comply.

36. On November 15, 2016, DPNR denied GSJ the opportunity for the clarification needed to effectuate any cure during even that short two (2) day cure window, when DPNR advised GSJ that the informal meeting scheduled for November 16, 2016 would have to be rescheduled to November 22 or 23, 2016, well past the cure deadline.

GSJ's Cures and Efforts to Mollify DPNR's Unreasonable Demands

37. In correspondence dated November 17, 2016, counsel for GSJ advised DPNR of the steps that had been taken to timely cure those of the claimed violations that were less confusingly described in the Notice to Cure, albeit without any clarification from DPNR. **[EXHIBIT K]**

38. GSJ further advised DPNR that the other claimed violations could not and should not be addressed without clarification or input from DPNR, which up to this point DPNR had been unwilling to provide.

39. During the November 22, 2016 meeting, so as to avoid further discord with DPNR, and to cause DPNR to lift its cease and desist order and continue to review GSJ's permits and the requests of GSJ for additional work on Great St. James, which DPNR refused to do while the Notice to Cure remained outstanding, GSJ:

- a. Advised DPNR of the significant remedial steps taken by GSJ prior to the meeting with regard to claimed violations, even though disputed;
- b. Resolved with DPNR inaccurately asserted violations and DPNR's improperly demanded cures; and

- c. Developed a plan and a reasonable timeframe within which to timely address areas of continuing concern to DPNR, whether or not GSJ agreed that such matters were within the scope of DPNR's authority.
40. During that meeting, as part of the plan of action jointly developed by GSJ and DPNR, the parties also specifically agreed on a deadline by which GSJ was to address the only two remaining items of concern to DPNR: (1) the transport of a non-permanent, movable covered picnic table away from its then current location on Great St. James to a remote staging area on Great St. James; and (2) the removal of a stretch of hand-laid stone from a pre-existing driveway on Great St. James.
41. Both the moveable covered picnic table and the hand-laid stone were removed by the agreed upon deadline of December 1, 2016, which date was less than thirty (30) days after GSJ's receipt of the original Notice to Cure. GSJ's cure by that date undoubtedly was accomplished within a reasonable cure period.
42. Despite GSJ's cures on such short notice and its substantial and successful efforts to satisfy DPNR's vague, unjustified, and unreasonable demands, on December 15, 2016, DPNR caused a Notice of Failure to Cure Breach of Settlement Agreement & Enforcement (the "Notice of Failure to Cure") to be served on GSJ. **[EXHIBIT L]**
43. None of the items asserted in the original Notice to Cure were included in the Notice of Failure to Cure with the exception of the non-permanent, moveable covered picnic table and the hand-laid stone in the pre-existing driveway, both of which were fully addressed before the Notice of Failure to Cure was issued.
44. These two (2) items, which were timely cured, in the manner and within the timeframe jointly established by GSJ and DPNR at their November 22, 2016 meeting, provided the sole basis for DPNR's Notice of Failure to Cure.

45. Although Defendants violated DPNR's obligations and GSI's rights under the Settlement Agreement by providing a factually and legally deficient Notice to Cure, unilaterally and arbitrarily imposing unreasonable cure deadlines, refusing to meet with GSI or to even discuss the deficiencies in the Notice to Cure with GSI prior to the expiration of the unreasonable cure deadlines, and, in the end asserting as failures to cure items which in fact had been timely cured, as a justification for the unprecedented assessment of Two Hundred Ten Thousand Dollars (\$210,000.00) provided in the Notice of Failure to Cure, Defendants improperly invoked the remedy provisions of the very Settlement Agreement Defendants clearly violated in issuing the Notice to Cure and the Notice of Failure to Cure and by their conduct in connection therewith.¹

COUNT I: BREACH OF CONTRACT

46. Plaintiff repeats and re-alleges the foregoing paragraphs of the Complaint as if fully set forth herein.

47. The parties negotiated and entered into the Settlement Agreement, a binding and valid contract, wherein Defendants agreed to provide written notice and a cure period in the event Defendants believed Plaintiff was not complying with the terms of the Settlement Agreement.

48. As the Settlement Agreement does not specify the content of the contractually required notice or a duration for the contractually required cure period, the Settlement Agreement must be reasonably interpreted to require a cure period of a reasonable duration after proper and adequate notice of any alleged violation to be cured.

¹ On January 17, 2017, GSI appealed the Notice of Failure to the Board of Land Use Appeals. This action, however, raises entirely separate causes of action derived from the Settlement Agreement provisions.

49. Defendants breached the Settlement Agreement by failing to provide both proper and adequate notice of alleged violations and appropriate cures and a reasonable cure period, as required by the Settlement Agreement.
50. Despite Defendants' breach of contract, and Plaintiff's timely cure, under the Settlement Agreement, Defendants have improperly imposed a Two Hundred Ten Thousand Dollar (\$210,000.00) penalty against the Plaintiff.
51. Plaintiff has been harmed by Defendants' breach of contract in that it caused the improper and wrongful assessment of a Two Hundred Ten Thousand Dollar (\$210,000.00) penalty against Plaintiff, as well as other harmful consequences, including DPNR's refusal to process or even consider any applications for permits submitted by GSI, in a total amount to be proven at trial.

COUNT II: VIOLATION OF GOOD FAITH AND FAIR DEALING COVENANT

52. Plaintiff repeats and re-alleges the foregoing paragraphs of the Complaint as if fully set forth herein.
53. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.
54. Defendants breached DPNR's duty of good faith and fair dealing by providing a legally and factually deficient Notice to Cure, unilaterally imposing an arbitrary and unreasonably short cure period on GSI, refusing to review, discuss and clarify with GSI the deficiencies in the Notice to Cure before the expiration of that improper cure period, including by cancelling a meeting with GSI scheduled to take place prior to the expiration of that cure period, imposing an unjustified and unprecedented Two

- Hundred Ten Thousand Dollar (\$210,000.00) penalty on GSJ for alleged violations that already had been cured timely, and refusing to process or even consider applications for permits submitted by GSJ.
55. Plaintiff has been harmed by Defendants' breach of DPNR's duty of good faith and fair dealing in an amount to be shown at trial.

COUNT III: ACTION FOR DECLARATORY JUDGMENT

56. Plaintiff repeats and re-alleges the foregoing paragraphs of the Complaint as if fully set forth herein.
57. The parties negotiated and entered into the Settlement Agreement, a binding and valid contract, wherein Defendants agreed to provide written notice and a cure period in the event Defendants believed Plaintiff was not complying with the terms of the Settlement Agreement.
58. As the Settlement Agreement does not specify the content of the contractually required notice or a duration for the contractually required cure period, the Settlement Agreement must be interpreted to require a cure period of a reasonable duration after proper and adequate notice of any alleged violation to be cured.
59. Defendants breached the Settlement Agreement by failing to provide both proper and adequate notice of alleged violations and appropriate cures and a reasonable cure period, as required by the Settlement Agreement.
60. Plaintiff timely cured all violations alleged in the Notice of Failure to Cure within the reasonable cure period permitted under the Settlement Agreement.

61. Despite Defendants' breach of contract, and Plaintiff's timely cure, under the Settlement Agreement, Defendants have improperly imposed a Two Hundred Ten Thousand Dollar (\$210,000.00) penalty against Plaintiff.
62. Furthermore, DPNR's refusal to process or even consider any applications for permits submitted by GSJ is causing GSJ further damages by indefinitely delaying the progress of construction and improvements on Great St. James.
63. Accordingly, pursuant to V.I. CODE ANN. tit. 5, §§ 1261-1272, Plaintiff seeks a judgment declaring that Plaintiff is entitled under the Settlement Agreement to adequate notice of any violations of the Settlement Agreement asserted by DPNR and a reasonable period of time within which to cure the same after receiving such notice, that Defendants provided neither adequate notice of asserted violations of the Settlement Agreement nor a reasonable period of time within which to cure the asserted violations, and that, as a result of the same, Defendants violated the Settlement Agreement.
64. Additionally, Plaintiff further seeks a judgment declaring that the Notice of Failure to Cure, being based upon and itself constituting a breach of the Settlement Agreement by Defendants, is outside the scope of and an unlawful exercise of Defendants' authority, as is the demand thereunder for GSJ to make payment of the Two Hundred Ten Thousand Dollar (\$210,000.00) penalty improperly imposed therein.
65. Additionally, Plaintiff further seeks a judgment declaring that DPNR's refusal to process or even consider any applications for permits submitted by GSJ, asserted by Defendants as being justified based on the unresolved Notice of Failure to Cure and non-payment of the Two Hundred Ten Thousand Dollar (\$210,000.00) assessment imposed therein, is also outside the scope of and an unlawful exercise of Defendants'

authority, and directing DPNR to consider and process GSI's applications for permits.

WHEREFORE, Plaintiff seeks all damages to which it is entitled, including contractual, compensatory, punitive and equitable damages, and declaratory relief, as well as an award of its costs and reasonable attorneys' fees, and any pre and post judgment interest to which it is entitled.

Respectfully,

Dated: March 8¹², 2017

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