

February 7, 2019

Vonetta Norman, Esq.
Department of Planning & Natural Resources
Division of Coastal Zone Management
4607 Tutu Park Mall
St. Thomas, VI 00802

Re: Cease & Desist Order No. C&D-01-19-STT
Great St. Jim, LLC ("Great St. Jim")

Dear Attorney Norman,

We appreciate you and Pedro Nieves meeting with Cecile DeJongh and me on January 29, 2019 to discuss the issuance of the Cease & Desist Order referenced above. This letter will address some of the concerns raised by your agency at the meeting, as well as the issues raised in your letter of January 28, 2019 and your email of February 1, 2018. There are some items about which we are still doing our own research. I will revert with any additional information as soon as it becomes available.

Clearing of Area Near Cistern

During our meeting, Mr. Nieves pointed out an area of roadside, close to a cistern, which he believed had been recently cleared without a permit. Upon review of the appropriate Google Earth images and our files, we disagree with Mr. Nieves' assessment that the area was recently cleared. In fact, the area to which Mr. Nieves referred is an area that that was cleared years ago and was the subject of a prior settlement entered into between Great St. Jim and DPNR in July 2016. The staff on Great Saint James ("GSJ") maintains this and other areas on a regular basis to ensure that they do not become overgrown or create hazardous conditions for residents, staff and vehicles traversing the island.

Construction Activity

Mr. Nieves provided us with photos taken by DPNR Enforcement Officers when they entered upon the island unannounced and proceeded to traverse the entire island, particularly near and around the island's residences, without permission. I will address photos KIMG 2052, KIMG 2054, KIMG 2098, KIMG 2099, KIMG 2100 and KIMG 2101.

- KIMG 2052, KIMG 2054: These photos show construction of a Fiki Bar and deck area on the main beach, directly below the residence.
- KIMG 2098, KIMG 2099, KIMG 2100 and KIMG 2101: These photos show repair activity being undertaken on the existing caretaker's cottage as well as the construction of additional living space adjacent to the cottage.

As discussed with you at the meeting, Great St. Jim submitted two minor permit applications to your office on July 14, 2017. On August 23, 2017, we received a notification of deficiency from J.P. Oriol advising of the additional information that needed to be submitted in connection with the issuance of the permits. Although

Great St. Jim was delayed in submitting its responses as a result of the hurricanes, it provided the completed information by hand delivery on February 8, 2018.

During our meeting, you stated that DPNR sent a letter to Great St. Jim in April 2018 regarding the insufficiency of the permit applications. However, this is completely at odds with our review of the matter and neither you nor your office have provided any such letter to us. In fact, in April 2018, the project architect, John Woods, was advised by DPNR that the permit review was completed, that the permits were approved and that a site visit would be scheduled. Other than the favorable report received by Mr. Woods, no one associated with Great St. Jim ever received any written or verbal communication from DPNR in April 2018, or any time thereafter, regarding any insufficiency in Great St Jim's permit applications. Nor did DPNR ever schedule its promised site visit.

As discussed at our meeting, 12 V.I.C. § 910 (4) states that [t]he ... Commissioner shall act upon a minor coastal zone permit application within sixty days after receipt thereof. Failure of ... the Commissioner to act within any time limit specified in this paragraph shall constitute an action taken and shall be deemed an approval of any such application. Applying the provisions of § 910 (4), because DPNR failed to act upon the minor coastal zone permits within sixty (60) days of the February 8, 2018 resubmission, the applications for the permits were deemed to have been approved under the statute on April 9, 2018.

All of the construction being undertaken on the island at the time of your visit was construction that was contemplated by the permit applications submitted to your office, which are deemed to have been approved as of April 9, 2018. Therefore, we believe that the Cease & Desist should be rescinded immediately so that construction can be continued in accordance with the approved permits. We would also ask that your office actually issue the approved permits as soon as possible so that we can avoid any additional issues with Enforcement.

Boat Repairs

During the meeting, we clarified that no boat repair is taking place on GSJ and that our concern was actually with Great St. Jim's ability to remove vessels that grounded on GSJ and were not removed by the U.S. Coast Guard after the hurricanes.

January 30, 2019 Barge

Your email of February 1, 2019 indicated that Enforcement reported “what looked to be a barge delivering a dump truck to the island.” As we have discussed with you, there are people living on the island who need the ability to carry out basic functions and normal day to day activities, including ensuring basic sanitary conditions and access to water. Based upon my discussions with the staff at GSJ, it is my understanding that- a truck was barged to the island to remove dumpsters full of debris and household trash. ~~I would also note that~~ As noted above, due to lack of rainfall and high demand for potable water on GSJ, from time to time it is necessary for potable water to be delivered to the island to ensure that the residents and staff have access to clean drinking water.

Finally, I would be remiss if I did not address the multiple unannounced entries and searches by your agency upon GSJ. Although we understand that you believe that you have unfettered access to traverse and search all over this island residence, we strongly disagree— and have yet to be provided with authority that gives you the right to enter our client's residence.

12 V.I.C. § 913 (4) states that “[t]he Commission, its Committees and the Commissioner shall have the power to enter at reasonable times upon any lands or waters in the coastal zone for which a coastal zone permit has

been issued, and the permittee shall permit such entry for the purpose of inspecting and ascertaining compliance with the terms and conditions of said coastal zone permit, and to have access to such records as the Commission, its Committees or the Commissioner in the performance of its or his duties hereunder may require permittee to maintain. Such records may be examined and copies shall be submitted to the Commission or Commissioner upon request.” Clearly, the express terms of this statute indicate that permission to enter must be granted by the permittee even before the Commission may undertake what would be an authorized search of areas of land as to which a CZM permit has been granted.

Absent a permit, 12 V.I.C. § 913 (6) provides “[w]hen 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.”

It was apparent during our meeting, that you did not believe there was permitted activity taking place on GSJ. Based on the express language of the statute, if in fact you did not believe that there was a permit, you did not have authority to enter upon the island and conduct an unrestricted search all over it as you did. You were limited by the terms of the statute to issuing a written order to cease and desist. The statute does not authorize anything more than that.

However, inasmuch as there are actually approved permits in place resulting from DPNR's failure to meet the statutorily imposed deadlines for issuing those permits, we understand that the Commissioner may enter at reasonable times upon GSJ solely in connection with those permits. Should DPNR seek such entry at a reasonable time, Great St. Jim would obviously allow such entry, so long as it was only for the limited purpose of inspecting and ascertaining compliance at the areas of permitted sites with the terms and conditions of Great St. Jim's coastal zone permits. In other words, we certainly would not object to your coming to GSJ to review compliance with the permits that were granted, but we strenuously object to the invasive manner in which your agency continues to effect illegal searches on GSJ for purposes well outside the scope of your statutory authority.

Showing up unannounced with multiple armed Enforcement officers, harassing the staff present on the island, insinuating that they are being evasive or unhelpful, and demanding access to the entire island, rather than just the areas where permitted activity is taking place, is neither reasonable nor lawful. Your agency has continuously ignored my client's constitutionally guaranteed right to privacy in his own home, indicating, instead, that you have the unfettered right to show up at GSJ whenever you want and go wherever you want. This is a clear and direct violation of my client's Fourth Amendment right to privacy.

Like the automobile exception, the Fourth Amendment's protection of curtilage has long been black letter law. “[W]hen it comes to the Fourth Amendment, the home is first among equals.” *Florida v. Jardines*, 569 U. S. 1, 6 (2013). “At the Amendment's ‘very core’ stands ‘the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’” *Ibid.* (quoting *Silverman v. United States*, 365 U. S. 505, 511 (1961)). To give full practical effect to that right, the Court considers curtilage “the area ‘immediately surrounding and associated with the home’” to be “‘part of the home itself for Fourth Amendment purposes.’” *Jardines*, 569 U. S., at 6 (quoting *Oliver v. United States*, 466 U. S. 170, 180 (1984)). “The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately

linked to the home, both physically and psychologically, where privacy expectations are most heightened.” California v. Ciraolo, 476 U. S. 207, 212–213 (1986). When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. Jardines, 569 U. S., at 11. Such conduct is presumptively unreasonable absent a warrant. To the extent that they at all authorize your agency’s entry and limited search on GSJ, the territorial statutes cannot and do not override my client’s right to privacy in his own home and the curtilage around it. We therefore must again request that you respect his constitutionally guaranteed right to privacy.

My client wishes to have a good relationship with your agency and is open to any suggestions you may have that do not infringe upon his constitutional rights, or result in his staff feeling threatened in their workplace or their home. My client further understands that there is specific concern regarding the submerged lands around GSJ and will ensure that no activity takes place with respect to the submerged lands without the proper permits. We would ask that you do everything possible to expedite the issuance of the dock permits which have been at your agency for over a year.

Please do not hesitate to contact me if you have any questions or need additional information.

Very truly yours,

Erika Kellerhals