

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

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<b>ALEXANDER JADAN,</b>	)	
<b>NATALIE JADAN, ANASTASIA TREY,</b>	)	
<b>and ELIZABETH TREY,</b>	)	<b>CIVIL NO. 610/2005</b>
	)	
<b>Plaintiffs,</b>	)	<b>ACTION FOR DAMAGES</b>
	)	<b>ABATEMENT OF NUISANCE</b>
<b>v.</b>	)	<b>and INJUNCTION</b>
	)	
<b>BAY ISLE ASSOCIATES, LLLP,</b>	)	
	)	
<b>Defendant.</b>	)	<b>JURY TRIAL DEMANDED</b>
	)	

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**PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

COME NOW the Plaintiffs, by and through undersigned counsel, and, pursuant to Superior Court Rule 7 and Federal Rule of Civil Procedure 56, respectfully move this honorable Court for partial summary judgment upon the issues of Defendant's liability upon Counts I, II, IV, V and VI of Plaintiffs' Second Amended Complaint.

This Motion is accompanied by a statement of the material facts about which the Plaintiffs contend there is no genuine issue and it is supported by the Memorandum of Law submitted in support of this Motion.

WHEREFORE, Plaintiffs pray this honorable Court to enter a Summary Judgment upon Counts I, II, IV, V and VI of Plaintiffs' Second Amended Complaint in this matter, entering judgment, as a matter of law, as follows:

(1) A judgment declaring that the construction being conducted by the Defendant on upon Parcels 86-3 and 86a-3, Cruz Bay, St. John, United States Virgin Islands is a violation of the Virgin Islands Zoning Code, found at 29 V.I.C., Chapter 3, §§221 - 242, specifically §226(I), by

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exceeding the height and density limits for R-4 Residential - Medium Density zoning districts found at 29 V.I.C. §229(e), and is therefore unlawful;

(2) A judgment declaring that Buildings A, B, C and D of the Grande Bay Resort, because of their violations of the Virgin Islands Zoning Code, constitute a private nuisance adversely affecting Plaintiffs' use and enjoyment of their property and that, pursuant to 28 V.I.C. §331 Plaintiffs are immediately entitled to an order enjoining the continuance of the nuisance and allowing a warrant to issue to abate the nuisance by removal of the top two stories of Buildings A, B, C and D of the Grande Bay Resort, in addition to damages that may be proven at trial;

(3) A judgment declaring that Buildings A, B, C and D of the Grande Bay Resort, because of their violations of the Virgin Islands Zoning Code, constitute a public nuisance pursuant to 29 V.I.C. §294(a)(6) and (b)(7) and mandating the Commissioner of the Department of Planning and Natural Resources to revoke, pursuant to 29 V.I.C. §294(c) and (f), any building permits or permits for use and occupancy heretofore issued to Bay Isles Associates, LLLC in respect to Buildings A, B, C and D of the Grande Bay Resort.

(4) A judgment declaring that the unlawful and excessive heights of Buildings C and D of Defendant's Grande Bay Resort are an unlawful invasion of and interference with Plaintiffs' property rights and interests by unlawfully dispossessing the Plaintiffs of their views from their residence and property and appropriating the said views to Defendant's benefit, thereby unjustly enriching Defendant to the detriment of the Plaintiffs and, a money judgment being an inadequate

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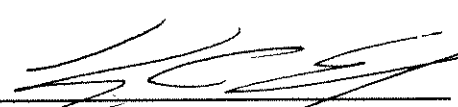
remedy, the benefits of Defendant's unjust enrichment and all profits flowing therefrom should be rendered and disgorged to the Plaintiffs;

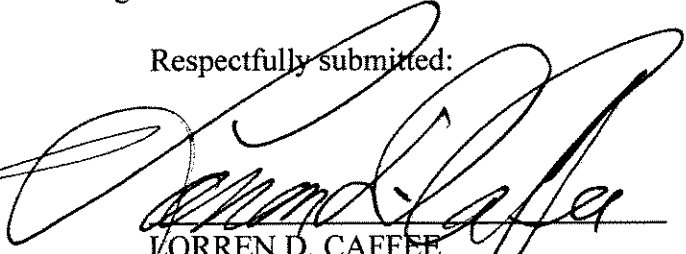
(5) A judgment declaring an equitable lien upon the property of the Defendant, due to the Defendant's unjust enrichment at the expense of the Plaintiffs, to secure payment of all restitution to be found to be due to the Plaintiffs after trial; and

(6) A judgment declaring a constructive trust to transfer beneficial and/or legal title to Defendant's interests in the top two stories of Buildings C and D of Defendant's Grande Bay Resort and all contracts and contract rights relating thereto.

DATED: December 18, 2007

Respectfully submitted:

  
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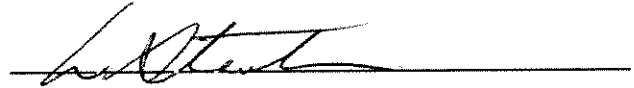
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and exact copy of the foregoing PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT with PLAINTIFFS' STATEMENT OF MATERIAL FACTS AND MEMORANDUM OF LAW IN SUPPORT was served on December 18, 2007, by hand delivery, upon:

Simone R. D. Francis, Esq.  
Ogletree, Deakins, Nash, Smoak & Stewart, L.L.C.  
The Tunick Building  
1336 Beltjen Road, Suite 201  
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<b>Plaintiffs,</b>	)	<b>ACTION FOR DAMAGES</b>
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<b>Defendant.</b>	)	<b>JURY TRIAL DEMANDED</b>
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**PLAINTIFFS' STATEMENT OF MATERIAL FACTS AND  
MEMORANDUM OF LAW IN SUPPORT OF  
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COME NOW the Plaintiffs, by and through undersigned counsel, and respectfully submit their statement of material facts upon which there is no genuine issue and their Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment upon the issues of Defendant's liability upon Counts I, II, IV, V and VI of Plaintiffs' Second Amended Complaint.

**STATEMENT OF MATERIAL FACTS**

1. Plaintiffs are owners of Parcel 86AA, Cruz Bay, St. John, Unites States Virgin Islands. (See copy of Deed of Gift attached hereto as **Exhibit 1**, copy of Quitclaim Deed recorded on July 11, 1995 attached as **Exhibit 2**, and copy of Quitclaim Deed recorded on October 16, 1998 attached as **Exhibit 3**.)
  
2. Defendant is the owner of the parcels being developed as Grande Bay Resort, which Resort includes buildings identified as Buildings A, B, C and D and the parcels upon which the structures are being built are: Parcels 86-3 (having an area of 0.507 acres) and 86a-3

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(having an area of 0.525 acres), Cruz Bay, St. John, United States Virgin Islands. Said Parcels are also now known as Consolidated Parcel 86-3 (having an area of 1.032 acres). (See copy of Deed attached as **Exhibit 4** and copy of a survey map of Consolidated Parcel 86-3 attached as **Exhibit 5**.)

3. Parcels 86-3 and 86a-3 (Consolidated Parcel 86-3), having a combined acreage of 1.032 acres, are zoned R-4 and Parcels 86-4 and 86a-4 are zoned W-1. See Paragraph 9 of attached **Exhibit 6** (Affidavit of Robert C. deJongh - also referred to herein as "the Affidavit") with a copy of Official Zoning Map SJZ-7 attached as *Exhibit 3* of the Affidavit.

4. Buildings A, B, C and D described above are being constructed on Parcels 86-3 and 86a-3 (Consolidated Parcel 86-3). (See copy of the Grande Bay "Site Plan" attached as **Exhibit 7**.)

5. Using non-conclusory terms chosen to not carry a legal connotation, Buildings A, B, C and D may be described as consisting of five (5) levels: a garage level and four residential levels above the garage. (See attached **Exhibits 8 through 24**.)

6. The residential levels of Buildings A, B, C and D consist of twenty-one (21) units that have one bedroom plus a "lockout unit"; fifteen (15) one-bedroom units; and twelve (12) three-bedroom units. (See attached **Exhibit 25** at the page designated as "DPNR-0152".)

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7. The "lockout" units are marketed as "live in one and rent out the other" and each "lockout" unit has: two separate entrances; two sleeping areas; two living and dining areas; two bathrooms; two laundry rooms; two kitchen/wet bar areas; and two separate balconies. (See Paragraph 21 of **Exhibit 6** and the exhibits to the affidavit referenced in that paragraph.)

8. Each of the ceilings of the garage levels for Buildings A, B, C, and D are more than five (5) feet above the grade of the sidewalk or street at the centers of the fronts of the buildings. (See Paragraph 29 of **Exhibit 6** and **Exhibits 8** through **24**.)

9. The top levels of Buildings A, B, C and D consist of enclosed residential units and semi-open units located between them. In addition, the top levels of all of the buildings are separated from the levels below them (See attached **Exhibits 26, 27, 28** and **29**) and have their own ceilings or roofs covering them. (See **Exhibits 8, 9, and 10** and photo **Exhibits 30** through **36**.)

10. Except for the fact that their floors serve as part of the ceilings over the floors below them, the top levels of the buildings have no elements in common with the levels below them and share nothing between them. (See Paragraph 38 of **Exhibit 6** and the Exhibits identified in Statement of Fact number 9 above.)

11. The construction of Buildings C and D of the Grande Bay Resort to the height that they have been built has completely obscured the view from Plaintiffs' residence and deck.

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(See photos of view previous to the construction attached as **Exhibits 37, 38 and 39** and photos of present view from Plaintiffs' deck attached as **Exhibits 36, 35, 34, 33 and 32.**)

12. The Division of Building Permits of the Virgin Islands Department of Planning and Natural Resources (DPNR) did not direct the Defendant's building permit applications to its Division of Comprehensive and Coastal Planning (CCZP) or seek that Division's review and opinion regarding the Grande Bay Resort development, and the CCZP has communicated to the Assistant Commissioner of the DPNR that the CCZP has never concurred with an interpretation of a mezzanine which would allow separate levels of buildings to be considered mezzanines. (See February 8, 2007 Memo from Marjorie Hendricksen-Emanuel to Assistant Commissioner Claudette C. Lewis attached as **Exhibit 40**).

**MEMORANDUM OF LAW IN SUPPORT OF  
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**Introduction**

The Virgin Islands Zoning and Subdivision Law provides at Title 29 V.I.C. §226(*I*), in pertinent part, that:

No structure shall be erected, . . . to exceed the height limit, density provisions, . . . herein established **for the district in which the structure is located**, except that penthouses or roof structures for the housing of elevators, stairways, tanks, ventilating fans or similar equipment . . . may be erected above the height limits herein prescribed . . .; nor shall such structure [penthouses or roof

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structures] have a total area greater than ten (10) percent of the roof area of the building; nor shall such structure be used for any residential purpose . . . (the bracketed insertion above is not in the original but is added for purposes of clarity) [*emphasis added*]

The two Zoning Code violations that are the subject of the Plaintiffs' Motion for Partial Summary Judgment which this Statement of Material Facts and Memorandum of Law accompanies are the Defendant's violation of the height limits and the density limits for structures in R-4 Residential - Medium Density Zoning Districts. The Grande Bay Resort Buildings A, B, C and D are located in an R-4 Zoning District.

Title 29 V.I.C. §229(f) provides in regard to density for R-4 Zoning Districts: "**Limitations on persons per acre.** The maximum number of persons per acre for residential structures shall not exceed one hundred twenty (120) persons at the time of construction." Since the total area of the parcel or parcels upon which the Grande Bay Resort Buildings A, B, C and D are located is 1.032 acres, the maximum density for the buildings, rounded up to the next whole number, is 124 persons ( $120 \times 1.032 = 123.84$ ). (See **Exhibit 6** at paragraph 18.) Title 29 V.I.C. §229(f) also provides "**Maximum height limit.** No residential structure shall exceed a height of three (3) stories."

Title 29 V.I.C. §294(a)(6), dealing with building permits and permit requirements, provides: "Any building, structure, or sign set up, erected, constructed, reconstructed, structurally altered, enlarged, moved, or converted contrary to the provisions of this subchapter is unlawful and a **public nuisance.** [*emphasis added*]."

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Title 29 V.I.C. §294(b)(5) and (7) incorporates the Virgin Islands Zoning Code into the ambit of the building permit process by providing:

(5) The issuance of a permit or the approval of plans and specifications **shall not be a permit for**, or an approval of, **any violations of this chapter or any applicable portion of the Virgin Islands Code** or of the Virgin Islands Rules and Regulations. **No permit presuming to give authority to violate the provisions of the Virgin Islands Code** or applicable Virgin Islands Rules and Regulations **shall be valid**, except in so far as the work or use which it authorizes is lawful.

...  
(7) The requirements of the Virgin Islands Zoning and Subdivision Law, sections 221 - 233 of this title, . . . shall be conformed to. [*emphasis added*]

Plaintiffs maintain that the Defendant's use of the R-4 building lots in violation of the Virgin Islands Zoning Code is a public nuisance and also a private nuisance which directly and injuriously impacts upon the value, income from, use and enjoyment of the Plaintiffs' property and residence, which adjoins the Defendant's R-4 building lots.

As a public nuisance, the violating buildings subject the Defendant to criminal prosecution pursuant to 14 V.I.C. §1461. Also, pursuant to 29 V.I.C. §312(e), the Defendant is subject to a prosecution by the Attorney General seeking a fine of \$500.00 for each day the violation continues and, pursuant to 29 V.I.C. § 312(g), the Attorney General, in addition to other remedies, may institute an action to "restrain, correct, or abate such violation or to prevent the occupancy or use of the building or structure or any illegal act or use in and about such premises."

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In *Biggs v. Virgin Islands Board of Land Use Appeals, et al*, 884 F.2d 108; 1989 U.S. App. LEXIS 13396 (3<sup>rd</sup> Cir., 1989) the Third Circuit Court of Appeals noted from the record of the case that the Board of Land Use Appeals had declared that a five-story building was in violation of its building permit after concluding that the basement and mezzanine of the building in question were in fact stories pursuant to the Zoning Code. The Third Circuit recognized the potential for an order by the Board of Land Use Appeals to demolish the building or remove its two top stories. The removal of the two top stories of Buildings A, B, C and D is an essential part of an order for abatement of the nuisance.

The Plaintiffs' Complaint invokes the provisions of 28 V.I.C. §331, *et seq* in its private nuisance counts. 28 V.I.C. §331 provides:

Any person whose property is affected by a private nuisance, or whose personal enjoyment thereof is in like manner thereby affected, may maintain an action for damages therefore. If judgment is given for the plaintiff in such action, he may, in addition to the execution to enforce the same, on motion, have an order allowing a warrant to issue to the marshal to abate such nuisance. Such motion shall be made at the term at which judgment is given, and shall be allowed of course, unless it appears on the hearing that the nuisance has ceased, or that such remedy is inadequate to abate or prevent the continuance of the nuisance in which latter case the plaintiff may proceed to have the defendant enjoined.

The *Restatement of Law Second, Torts*, §822 provides:

One is subject to liability for a nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

(a) intentional and unreasonable, or

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(b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

In this case the Defendant's actions are intentional and unreasonable or they are, at least, actionable as negligence, due to the presumption of negligence that flows from an act that violates a statute, in this case a violation of the Virgin Islands Zoning Code.

The specific Zoning Code violations are discussed below. The discussion will first address the density limit violation and the second part will address the height limit violation. Throughout the discussions, it must be remembered that planning and zoning issues are completely different subjects from building code issues even though, as shown above, the parts of the Virgin Islands Building Code that deal with permits and enforcement specifically incorporate the Virgin Islands Zoning Code. The Virgin Islands Zoning Code is found at Title 29, Chapter 3 of the Virgin Islands Code Sections 221 through 242. The Virgin Islands Building Code is found at Title 29, Chapter 5 of the Virgin Islands Code.

Furthermore, Title 29, Chapter 3 of the Virgin Islands Code, Section 226(a) establishes the primacy of the Virgin Islands Zoning Code over zoning issues, providing:

When any provision of this subchapter imposes more stringent requirements, regulations, restrictions, or limitations than are imposed or required by the provisions of any other regulations, statute or law, the provisions of this subchapter shall apply and govern.

Therefore, any attempt to import provisions from elsewhere in the Virgin Islands Code into the Virgin Islands Zoning Code to create exceptions or countervailing requirements is ineffective

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if the provisions outside of the Zoning Code are less stringent or restrictive. The Defendant and its architects have repeatedly employed Building Code provisions in a manner to contravene or diminish the effect of Zoning Code provisions and such attempts have been permitted by the Department of Planning and Natural Resources (hereafter "DPNR") without proper reference to or consideration of Zoning Code provisions.

**a. The R-4 density limit is violated by the Defendant's Grande Bay Resort construction of Buildings A, B, C and D.**

The building lots for Buildings A, B, C and D are in an R-4 zoning district and, therefore, the applicable statutory density limitation is 120 persons per acre. See Title 29 V.I.C. §229(f) cited and quoted above. As has been previously shown, the total area of the parcel or parcels upon which the Grande Bay Resort Buildings A, B, C and D are located is 1.032 acres and, therefore, the maximum density for the buildings, rounded up to the next whole number, is 124 persons ( $120 \times 1.032 = 123.84$ ).

From the very outset of its permit application process, Defendant and its architects have claimed that the building parcels included Parcels 86-4 and 86a-4 (hereafter, "the beach lots"), even though the beach lots are located across the public road from the building site and have nothing constructed upon them. The Defendant and its representatives have also falsely claimed that the beach lots are in the R-4 zoning district when it can plainly be seen (See Paragraph 9 of **Exhibit 6** and Zoning Map SJZ-7 attached as *Exhibit 3* of the Affidavit.) that the beach lots are in a W-1

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zoning district. See also copies of: Permit Application forms attached as **Exhibit 41**; Description of Work attached as **Exhibit 42**; and further Permit Application forms attached as **Exhibit 43**.

The three preceding Exhibits show the Defendant variously proposing total density calculations for the buildings of 134, 137, 126.5 and 176 persons. Calculations recorded by DPNR on November 16, 2005 placed the total density at 132 persons. See **Exhibit 44**. Calculations submitted to DPNR by Defendant's new architect, John Bedminster, RA, on November 18, 2005 claim a total density of 141 persons. See **Exhibit 45**.

The Defendant's use of the deeded acreage/square footage of the beach lots to increase the density capacity of the parcels upon which the Grande Bay Resort Buildings A, B, C and D are actually placed is improper in light of both the letter and the spirit of the Virgin Islands Zoning Code.

The requirements and limitations of parcels in W-1, Waterfront-Pleasure, Zoning Districts include the following: (a) "Permitted density. Every zoning lot shall be occupied by not more than two (2) dwelling units."; (b) "Required lot area. Every parcel of property to be utilized for a W-1 use shall have a minimum lot area of ten thousand (10,000) square feet."; (c) "Permitted lot occupancy. No building shall occupy more than forty (40) percent of the area of the zoning lot."; (d) "Usable open space. In addition to the requirements set forth herein for Permitted Lot Occupancy and for Off-Street Parking, thirty (30) percent of the area of the zoning lot shall be

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reserved for Usable Open Space.”; (e) “Front yard. Every structure in a W-1 District shall be set back from the front property line a minimum distance of twenty-five (25) feet.”; and (f) “Maximum height limit. No building shall exceed a height of three (3) stories”. See: Title 29, Virgin Islands Code, Chapter 3, Section 229(o).

The beach parcels cannot be permitted to be added to the acreage of the building parcels for density calculations because: (1) the density limit for W-1 parcels is not calculated upon their areas; (2) the beach lots are separated from the other lots by a public road; (3) no construction would be permitted on the beach lots even if they were not separated from the other parcels; and (4) the beach lots have no density value due to the impossibility of any legal construction upon them.

Therefore, the only acreage that should be used for density calculation under the Virgin Islands Zoning Code regarding the construction upon Parcels 86-3 and 86a-3, also known as Consolidated Parcel No. 86-3, is the acreage of the parcel(s) upon which the buildings in question are located: 1.032 acres. See copy of Grande Bay Site Plan attached as **Exhibit 7**.

As has been definitively explained and calculated in Robert deJongh’s Affidavit (**Exhibit 6**, at Paragraphs 11 through 18), the correct density limit for the Grande Bay Resort Buildings A, B, C and D is 124 persons. Even without re-evaluating the proper number of persons to be attributed to the 21 “lockout” units in the buildings and simply accepting the Defendant’s own

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calculations, it is inescapable that every one of the total density figures presented by the Defendant, as well as the DPNR's own total density figure of 132 persons, is in excess of the legal density limit for R-4 zoning districts.

Robert deJongh's Affidavit (**Exhibit 6**, at Paragraphs 19 through 24) concludes that a proper attribution of persons to each of the 21 "lockout" units is 3½ persons per "lockout" unit, rather than the 3 persons per unit that applies to ordinary two-bedroom units, due to the fact that each such unit consists of: two separate entrances; two sleeping areas; two living and dining areas; two bathrooms; two laundry rooms; two kitchen/wet bar areas; and two separate balconies. This corrected attribution increases the total density of the buildings to 151 persons, an even greater violation of the 124 person limit for the 1.032 acres upon which the buildings are constructed.

The practical consequences of such density violations and of such construction upon the general public and, especially upon immediate neighbors such as the Plaintiffs, include, but are not limited to: increased noise, increased traffic problems, increased parking problems, increased trash and pollution, and increased stress upon various infrastructure elements. All of these consequences will have a detrimental impact and effect upon the value, use, and enjoyment of Plaintiffs' neighboring property.

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**b. The R-4 building height limit is violated by the Defendant's Grande Bay Resort construction of Buildings A, B, C, and D.**

The maximum building height for structures in R-4 zoning districts is three stories. See 29 V.I.C. §229(f). There can be no dispute about the fact that there are five separate levels within each of the Grande Bay Resort Buildings A, B, C and D, *i.e.* a basement and four residential levels. The Defendant's own plans frequently call the top residential floors the "Fourth Floor". See, for example, **Exhibits 26, 27, 28 and 29**.

The legal conclusion that must be drawn by this honorable Court is a determination of how many of these five levels constitute "stories", for purposes of the Virgin Islands Zoning Code. The Virgin Islands Zoning Code definition of a "story" is as follows:

29 V.I.C. §225(b)(92)

**Story.** That portion of a building, other than a cellar or mezzanine, included between the surface of any floor and the floor next above it, or if there be no floor above it, then the space between the floor and the ceiling next above it. A mezzanine shall be deemed a full story when it covers more than thirty-three (33) percent of the area of the story underneath said mezzanine, or if the vertical distance from the floor next below it to the floor next above it is twenty-four (24) feet or more.

For the purpose of this subchapter, a basement or cellar shall be counted as a story if its ceiling is over five (5) feet above the level from which the height of the building is measured or if it is used for business purposes or if it is used for dwelling purposes by other than a janitor of domestic servants employed in the same building, including the family of same."

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The only dispute between the parties in this action as to which levels of Buildings A, B, C and D should be deemed stories for zoning purposes is whether the basement levels and the top levels of the buildings qualify as stories. The intervening three residential levels are indisputably stories for zoning purposes.

Addressing the basement levels first, the final paragraph of 29 V.I.C. §225(b)(92) quoted above sets forth a reasonably clear-cut and readily implemented test of whether a basement or cellar is to be considered a story for zoning purposes. In the instance of Buildings A, B, C and D, the test is whether the ceilings of the basement garages are “over five (5) feet above the level from which the height of the building is measured.”

That level is identified by 29 V.I.C. §225(b)(55C) which declares that the height of a building is

**The vertical distance from the established grade of the center of the front of the building** to the highest point of the roof surface of a flat roof, to the deck line for a mansard roof, to the mean height level between the eaves and ridge for hip, gabled and gambrel roofs.  
[emphasis added]

To determine what is meant by “established grade” we must look to Title 29, Chapter 3 of the Virgin Islands Code, Section 225(b)(53) which uses the term in its definition of “Grade” and which reads as follows:

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*Grade.* The established grade of the street or sidewalk as prescribed by the Department of Planning and Natural Resources. Where no such grade has been established, the grade shall be the average elevation of the sidewalk at the property line. Where no sidewalk exists, the grade shall be the average elevation of the street adjacent to the property line.

In light of 29 V.I.C. §225(b)(55C), there is no question that the height measurement is to be made from the center of the front of a building. Grande Bay Resort's Buildings A and B both front directly upon the public road as is depicted by **Exhibits 17, 18 and 31**. These photo Exhibits remove any doubt that the ceilings of the basement garages of Buildings A and B are more than five (5) feet above the level of the street. In addition, looking at **Exhibit 9** it can be seen that the dimension shown on the lower left side of the elevation drawing indicating the basement height is 14 feet above the street level, which height stays constant along the front of the building.

As to the appropriate measuring point for Buildings C and D, photographic **Exhibits 19, 20, 21, 22, 23 and 24** show a drive or street going up to Buildings C and D. The first building appearing on that street or drive is Building C. See **Exhibit 7**. The street or drive continues uphill, turns, and terminates at the far end of Building D and the entrance to the basement garage for both Buildings C and D. **Exhibits 21, 22 and 23** depict this continuation of the street or drive and **Exhibit 21** shows a sidewalk in front of Buildings C and D separated from the street or drive by a short wall barrier. The sidewalk shares the same level and incline in front of the buildings as the street or drive.

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Again, the above photographic Exhibits make it extremely clear that the ceiling of the basement garage under Buildings C and D is far higher than five (5) feet above the grade in front of the buildings. The Wall Section drawings for Buildings C and D, Exhibits 14 and 15 respectively, show the dimension from the floor of the basement garage to its ceiling to be 14 feet. The photographic Exhibits show that the shortest height of the ceiling of the basement garage above the drive/street/sidewalk occurs at the entrance to the garage. Therefore, it can be safely concluded that at the centers of the fronts of the buildings, the heights above the drive/street/sidewalk are much greater than 14 feet.

Defendant and its architects have claimed to the DPNR that *International Building Code*, (hereafter "IBC") Section 508.4 allows the elimination of basement garages from the story count. (See the third page, marked DPNR-0152, of Exhibit 25). Even if the said provision were intended to apply to zoning questions, it would be superceded by 29 V.I.C. §226(a), cited and quoted above. However, the very language of this IBC section belies the use to which Defendant has attempted to put it. The full text of IBC Section 508.4 is as follows:

**508.4 Parking beneath Group R.** Where a maximum one-story above grade plane Group S-2 parking garage, enclosed or open, or combination thereof, of Type I construction or open Type IV construction, with grade entrance, is provided under a building of Group R, the number of stories to be used in **determining the minimum type of construction** shall be measured from the floor above such a parking area. The floor shall comply with the type of construction required for the parking garage and shall also provide a fire-resistance rating not less than the mixed occupancy separation required in Section 302.3.2. [emphasis added]

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It is undeniable that this provision relates only to building code issues and construction materials, methods and practices. It has no bearing upon the Virgin Islands Zoning Code. A building permit relying upon this section to resolve a zoning question is improper and invalid. The 1997 *Uniform Building Code*, which was in effect at the time of the issuance of the first two of the Defendant's three building permits, contained a similar provision at its Section 311.2.2.1 but it also did not extend to zoning code issues and dealt only with construction concerns.

Consequently, as a matter of law, the basement garages for Buildings A, B, C and D all must be considered to be stories for purposes of the Virgin Islands Zoning Code, bringing the story count at this point up to four stories, even before the nature of the top floors is considered. This determination alone makes all four buildings violations of the height limit for R-4 zoning districts.

The top levels of Buildings A, B, C and D also qualify as stories under the Virgin Islands Zoning Code. On this question, the pertinent part of 29 V.I.C. §225(b)(92) cited and quoted above is its first paragraph:

**Story.** That portion of a building, other than a cellar or mezzanine, included between the surface of any floor and the floor next above it, or if there be no floor above it, then the space between the floor and the ceiling next above it. A mezzanine shall be deemed a full story when it covers more than thirty-three (33) percent of the area of the story underneath said mezzanine, or if the vertical distance from the floor next below it to the floor next above it is twenty-four (24) feet or more.

The above Zoning Code definition of a story employs, but does not define, the term "mezzanine" and the Virgin Islands Zoning Code does not contain a definition for the term

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“mezzanine” elsewhere. The second sentence of the above-quoted paragraph imposes a limit upon the area covered by a mezzanine, beyond which a mezzanine is considered a story. The question of the areas covered by the top levels of Buildings A, B, C and D is not even material until and unless it is determined that they qualify as mezzanines.

Robert C. deJongh addresses the issues relating to the top levels of the buildings in detail in Paragraphs 33 through 50 of his Affidavit (**Exhibit 6**). The Defendant’s architects have employed a number of terms to describe the top levels of Buildings A, B, C, and D to the DPNR: “loft” (**Exhibits 41, 42 and 43**), “penthouse” (**Exhibit 50**), and “mezzanine” (**Exhibit 25**, which uses all three terms). The submissions by the Defendant have focused upon claiming that the top levels of the buildings cover an area less than 33% of the story below them. See for example **Exhibit 25** and a copy of a “Site Analysis” submitted by A. Michael Milne, AIA attached as **Exhibit 46**. The said “Site Analysis” will be addressed later in more detail because its area representations are extremely misleading and unjustified.

The use of the terms “loft” and “penthouse” are not used in the Virgin Islands Zoning Code definition of a story quoted above and have no bearing on the issue. The term “penthouse” appears in the Virgin Islands Zoning Code at Title 29, Virgin Islands Code, Chapter 3, Section 226(l). This provision prohibits structures that exceed the Code’s height limits, density provisions, or bulk provisions and includes an exception for “penthouses or roof structures for the housing of elevators, stairways, tanks, ventilating fans or similar equipment”, but limits the total area of such structures

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to ten percent of the roof area of the building. Clearly, the top stories of Buildings A, B, C and D are not penthouses for zoning purposes.

The term "loft" does not appear in the Virgin Islands Zoning Code. *A Visual Dictionary of Architecture*, (1995) by Van Nostrand Reinhold defines a loft as "One of the upper floors of a warehouse or factory, typically unpartitioned and sometimes converted or adapted to other uses, as living quarters, artists' studios, or exhibition galleries." The term has no significance for the Zoning Code.

Since the Virgin Islands Zoning Code does not contain a definition of "mezzanine", other sources must be consulted to settle upon a commonly accepted meaning for the term. In *Laird v. Redwood Trust LLC*, 392 F.3d 661 (4<sup>th</sup> Cir., 2004) the Fourth Circuit Court of Appeals was required to determine, for purposes of an ADA action, whether a floor in the building in question was a mezzanine because mezzanines are exempted from the concept of a story for ADA purposes. That court had the benefit of a definition of "mezzanine" appearing at 28 C.F.R. pt. 36, app. A §3.5 (2002). The definition said a mezzanine is "that portion of a story which is an intermediate floor level placed within the story and having occupiable space above and below its floor." To hone the definition to a finer point, the court then consulted *Webster's Ninth New Collegiate Dictionary* to define "portion" and "intermediate". The court found that the floor level in question met the definition of a mezzanine because it was less than a story by itself, it had a limited occupiable area

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within the story in which it was located, it allowed patrons to view the floor below, and it was located between the floor over which it extended and the roof of the building. *Id.*, p.665.

Even though building code provisions do not apply to and control zoning code issues, when it is necessary to determine a commonly accepted meaning of a term, it is appropriate to consult building codes. The 1997 *Uniform Building Code* was the operative Building Code adopted by 29 V.I.C. §311(i) of the Virgin Islands Building Code until October of 2004. This Code was in effect in the Virgin Islands at the time that the first two building permits were issued by DPNR to the Defendant. Section 214-M of the 1997 *Uniform Building Code* defines the term "mezzanine" as follows: "A MEZZANINE or MEZZANINE FLOOR is an **intermediate floor placed within a room.**" [emphasis added]

The 2003 *International Building Code* and its subsequent editions was adopted by 29 V.I.C. §311(i) of the Virgin Islands Building Code in October of 2004. Section 502 of the 2003 *International Building Code* and its 2006 edition defines a "mezzanine" as "An **intermediate level or levels between the floor and ceiling of any story** with an aggregate floor area of not more than one-third of the area of the room or space in which the level or levels are located." [emphasis added]

*A Visual Dictionary of Architecture*, (1995) by Van Nostrand Reinhold, defines a mezzanine as "A low or partial story between two main stories of a building, esp. one that projects as a balcony and forms a composition with the story beneath it." *The American Heritage*

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*Dictionary of the English Language*: Fourth Edition, 2000 defines the term to mean "A partial story between two main stories of a building." and states that its etymology is French coming from the Italian word "mezzanino", a diminutive form of "mezzano", meaning "middle", and from the Latin "medianus", meaning "of the middle" or "median". *Mean's Illustrated Construction Dictionary*, 2<sup>nd</sup> Edition, 2003 defines a mezzanine as "A suspended floor, usually between the first floor and the ceiling, that covers less area than the floor below." Relying upon, among other sources, the *Dictionary of Architecture and Construction* (1975), the *Art & Architecture Thesaurus Online* states that the term should be used "for low-ceilinged stories between two stories with higher ceilings, or for balconylike stories over a part of the story below, the lower story usually, but not necessarily, being the first story." It is easy to recognize that the common element of every definition of a mezzanine is that it is a floor between a floor and ceiling of a story.

Robert C. deJongh at Paragraph 38 of his Affidavit (**Exhibit 6**) states "Another essential element of a mezzanine is that it shares the air, airspace and ceiling of the story within which it exists." The top levels of Buildings A, B, C and D are all completely separated from the stories below them (See **Exhibits 26, 27, 28 and 29**) and have their own ceilings and roofs covering only them. See **Exhibits 8, 9, 10 and 13** and photographic **Exhibits 30, 31, 32, 33, 34, 35 and 36**. Except for the fact that their floors serve as part of the ceilings over the stories below them, they have no elements in common and share nothing with the stories below them.

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Although it is totally inapplicable to the Virgin Islands Zoning Code, Subsection 505.1 of the *International Building Code* has been cited by the Defendant and its architects to the DPNR as the authority to support the proposition that the top levels of Buildings A, B, C, and D are mezzanines and should not be considered as stories for zoning purposes. See **Exhibit 25**.

Subsection 505.1, in its entirety, provides as follows:

**505.1 General.** A mezzanine or mezzanines in compliance with this section shall be considered a portion of the floor below. Such mezzanines shall not contribute to either the building area or number of stories as regulated by Section 503.1. The area of the mezzanine shall be included in determining the fire area defined in Section 702. The clear height above and below the mezzanine floor construction shall not be less than 7 feet (2134 mm)."

It is clear that the language of Subsection 505.1 does not extend its provisions to zoning issues or the Virgin Islands Zoning Code and it carefully limits its applicability solely to the construction concerns of Section 503.1.

The lack of pertinence of this section to the zoning issue of building height for Buildings A, B, C and D is even more apparent when one considers the fact that Section 505 of the *International Building Code* imposes a number of conditions upon the use of mezzanines. Among them, are: "The aggregate area of a mezzanine or mezzanines within a room shall not exceed one-third of the area of that room or space in which they are located . . ." (Subsection 505.2); "Each occupant of a mezzanine shall have access to at least two independent means of egress . . ." (Subsection 505.3); and "A mezzanine shall be open and unobstructed to the room in which such

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mezzanine is located except for walls not more than 42 inches (1067) high, columns and posts.” (Subsection 505.4). On the face of the building plans (See **Exhibits 26, 27, 28 and 29**), it is clear that none of these conditions are met by the top floors of Buildings A, B, C and D of the Grande Bay Resort. Furthermore, Subsections 505.2 and 505.4 both accept the concept that a mezzanine is a floor within a room, a concept that the top floors of Buildings A, B, C and D cannot meet. Therefore, any benefit that could be accorded to these buildings by Subsection 505.1, even for building code purposes, is lost because the top floors do not comply with Section 505 of the *International Building Code*.

The Defendant, by its architects, has also regularly represented to DPNR that the top floors of Buildings A, B, C and D avoid consideration as stories pursuant to the Zoning Code's definition of a story found at 29 V.I.C. §225(b)(92) (quoted above) by simply claiming that the top floors cover 33% or less of the area of the stories below. This reasoning is akin to arguing that, since chickens have two legs, all two-legged creatures are chickens. As has been shown above, the top stories of these buildings are not mezzanines; therefore, the area they cover does not matter.

Nevertheless, the record shows that the representations and calculations made by the Defendant and its architects are misleading at best. See **Exhibit 6** at Paragraphs 41 through 47. **Exhibit 46**, at the pages marked as DPNR-0134 through DPNR-0136, is a “Site Analysis” that purports to show the areas of the top floors of Buildings A, B, C and D in comparison to the areas

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of the "third floors" below them to calculate the ratio of the coverage of the "third floors" that the top floors represent. The areas illustrated in this "Site Analysis" are drawn so as to carefully avoid all areas on the top floors of the buildings except the completely enclosed areas of the condominium units on those floors, even to the extent of disregarding the covered decks and verandas that are parts of each of the condominium units. (See **Exhibits 25, 26, 27 and 28**) Furthermore, the "Type T2" and "Type T3" rooftop terraces which are to be sold separately and "assigned" to condo unit buyers, and which are also under roof, are excluded from the illustrations and calculations. (See Paragraphs 45 and 46 of **Exhibit 6** and the Affidavit Exhibits referenced therein.)

The "Site Analysis" not only engages in an extremely misleading representation of the top floors' areas but it totally avoids the real inquiry that 29 V.I.C. §225(b)(92) requires for a comparison of the areas of a mezzanine and the story beneath it. The pertinent language of the statute is: "A mezzanine shall be deemed a full story when it covers more than thirty-three (33%) of the area of the story underneath said mezzanine." Therefore, if there is a true mezzanine involved, the question is simply how much of the story below is covered by the mezzanine. **Exhibits 25, 26, 27 and 28** show very clearly that the enclosed portions of the condominium units, their decks and verandas, and the covered "rooftop terraces" comprise a very large part of the ceilings that cover the story below them. It is obvious that that area greatly exceeds 33%.

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Therefore, even if the top floors of Buildings A, B, C and D could be considered mezzanines, which they cannot, the areas of the stories below them that are covered by the top floors are far greater than 33% of the stories below and, for that reason alone, the top floors must be considered stories.

The conclusion is inescapable that the top levels of Buildings A, B, C and D of the Defendant's Grande Bay Resort are all stories pursuant to the Virgin Islands Zoning Code. This means that the Defendant has constructed four five-story buildings in a zoning district that allows a maximum of three stories.<sup>1</sup>

Not only are the Grande Bay Resort's Buildings A, B, C and D illegal as they exist on the R-4 parcel/parcels upon which they are constructed, they would also be illegal on a parcel of the same size in any Zoning District known to the Virgin Islands Zoning Code. The only Virgin Islands Zoning Districts that allow more than three stories are R-3 Residential - Medium Density districts and R-5 Residential - High Density districts. See 29 V.I.C. §229.

The requirements for R-3 districts, found at 29 V.I.C. §229(e), allow up to 6 stories in building height, but the principal residential structures cannot occupy more than 30% of the area

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<sup>1</sup> Although Plaintiffs have not alleged it as a basis for their Complaint against the Defendant, it is believed that the buildings in question, measured by the area consumed by their basement garages, also exceed the 50% lot occupancy limit for an R-4 property.

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of the zoning lot and an additional 35% of the lot area must be "Usable Open Space". A reference to the project's Site Plan (**Exhibit 7**) quickly dispels any question as to whether more than 30% of the building site is being consumed. The density limitation for R-3 properties is 80 persons per acre, a limitation that is far exceeded by the Grande Bay Resort buildings.

The requirements for R-5 districts, found at 29 V.I.C. §229(e), allow up to 8 stories and permit a density of up to 160 persons per acre but the principal residential structures cannot occupy more than 30% of the area of the zoning lot and an additional 35% of the lot area must be "Usable Open Space". Again, a reference to the project's Site Plan (**Exhibit 7**) confirms that more than 30% of the building site is being consumed.

In short, the Grande Bay Resort, as built, does not belong on a property of this size any place in the United States Virgin Islands, and especially not in Cruz Bay, St. John. It is a monstrous monument to greed and rapacious overreaching. It has been permitted by DPNR (to view the permitting process for this project in the most charitable light), out of a lack of understanding of the Virgin Islands Zoning Code, which the DPNR is charged with implementing and enforcing, and a lack of interest in pursuing zoning issues that were apparent and enforcing the Zoning Code.

The Defendant's illegal development and construction actions, abetted by the DPNR's dereliction of its duty, have directly and injuriously impacted the value, income from, use and

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enjoyment of the Plaintiffs' property and residence. Therefore, the Defendant is liable to the Plaintiffs for creating and maintaining a private nuisance to the direct detriment of the Plaintiffs. In addition to such monetary damages as may be proven at trial by the Plaintiffs, they are entitled, upon entry of a judgment of liability, to a permanent injunction enjoining the Defendant from maintaining or continuing the nuisance pursuant to 28 V.I.C. §331 and an order of abatement of the Zoning Code violations which have given rise to the nuisance.

In addition, 29 V.I.C. §294(a)(6) provides that such violations of the Virgin Islands Code are public nuisances. Title 29 V.I.C. §294(b)(5) and (7), quoted in full earlier in this Memorandum, render a "permit presuming to give authority to violate the provisions of the Virgin Islands Code", including the requirements of the Virgin Islands Zoning and Subdivision Law, invalid.

Title 29 V.I.C. §294(f) gives the Commissioner of the Department of Planning and Natural Resources the authority to

revoke any permit issued under the provisions of this chapter whenever there has been any false statement or any misrepresentation as to a material fact in the application on which the permit was based, or whenever any permit has been issued in error and conditions are such that the permit should not have been issued, or at any time that the Commissioner finds that the provisions of this chapter are not being complied with.

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Plaintiffs have learned that the DPNR is expected to issue a Certificate of Use and Occupancy or a Temporary Certificate for a portion of the buildings at Grande Bay Resort. Title 29 V.I.C. §294(c) authorizes the Commissioner of the DPNR to issue permits and certificates for use and occupancy of a building only after inspection that confirms that “the work performed under the permit conforms to the requirements of this chapter **and other applicable laws**”. [emphasis added] Furthermore, 29 V.I.C. §294(c)(1) prohibits the issuance of a permit or Certificate of Use and Occupancy for any building “unless the building conforms to the provisions of this chapter with respect to the proposed use.”

In order to halt any further and continuing violations of the Virgin Islands Zoning Code that can only serve to exacerbate the injury and damages suffered by the Plaintiffs, it is necessary that this honorable Court render judgment upon the issues of liability as set forth in the attached Motion and this Memorandum and order that a permanent injunction and an order for abatement be entered pursuant to 28 V.I.C. §331, *et seq.*

This Court’s judgment in this matter will serve as definitive legal interpretations of the affected provisions of the Virgin Islands Zoning Code. It is hoped that those interpretations will serve as guidance and an impetus for appropriate action by the Department of Planning and Natural Resources to enforce both the Virgin Islands Zoning Code and the Virgin Islands Building Code and act to terminate and abate this public nuisance.

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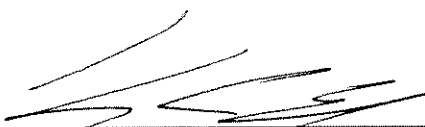
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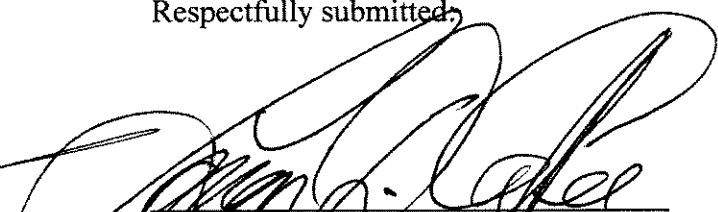
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DATED: December 18, 2007

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