



Office of  
Legal Counsel

# The Legislature of the Virgin Islands

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## MEMORANDUM

**TO:** The Honorable Novelle E. Francis, Jr.  
President  
Thirty-Fifth Legislature of the Virgin Islands

**FROM:** Holly L. Fulkerson /s/HLF  
Assistant Legal Counsel

**THRU:** Amos W. Carty, Jr., Esq.  
Chief Legal Counsel

A handwritten signature in blue ink, appearing to read "Amos W. Carty, Jr.", written over the "THRU:" line.

**DATE:** July 10, 2023

**RE:** **BR23-0621** (To request a legal interpretation of 31 V.I.C. § 205(f) in light of the land exchange proposed in BR23-0590 by the Governor of the Virgin Islands, Albert Bryan Jr., through the President of the Legislature of the Virgin Islands, Novelle E. Francis, Jr.)

## QUESTION PRESENTED:

Does 31 V.I.C. § 205(f) prohibit the Legislature of the Virgin Islands from approving the land exchange between the National Park Service and the Government of the Virgin Islands proposed by Governor Bryan through the President of the Legislature, Novelle E. Francis, Jr.?

## BRIEF ANSWER:

No. However, the Legislature should specifically exempt the land exchange from the prohibition in section 205(f) of title 31.

## DISCUSSION:

Bill Request No. 23-0590 (G35-009) requests that the Legislature of the Virgin Islands ratify the Governor's approval of the exchange of real property between the United States Department of the Interior, National Park Service and the Government of the Virgin Islands

wherein the Government of the Virgin Islands will convey Tract No. 02-101 Whistling Islands a/k/a Whistling Cay, Cruz Bay Quarter, to the United States of America, Department of Interior, and the United States Department of Interior, National Park Service will convey to the Government of the Virgin Islands a portion of Tract No. 01-137A Catherineberg, Hammer's Farm, Cruz Bay Quarter, St. John, Virgin Islands.

To evaluate this land exchange, two sections of the Virgin Islands Code must be considered. Title 31, Virgin Islands Code, section 231a sets forth the requirements under which the Government of the Virgin Islands can, with the approval of the Legislature, acquire real property by purchase or exchange for any public purpose and states in pertinent part: "(a) In all cases where the Government of the Virgin Islands is authorized to acquire real property by purchase or exchange for any public use, other than by condemnation, and the Governor shall express in writing his opinion that said real property is needed for a specific public purpose, the Commissioner of Property and Procurement shall appoint three appraisers, who are residents of the Virgin Islands, and who, by reason of occupation and experience are acquainted with Virgin Islands real property values, to severally or jointly make a careful inspection of the land and submit severally to the Legislature and the Commissioner of Property and Procurement a written statement of the value of the real estate or right to be acquired, accompanied by a comprehensive statement of the unit prices or factors included or the method used in the computation of the total value." The proposal outlined in BR 23-0590 complies with 31 V.I.C §231a in as far as it involves the *acquisition* of real property. <sup>1</sup>However, because this proposal

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<sup>1</sup> In *All Star Corp. v. Government of Virgin Islands*, 483 F. Supp, the District Court of the Virgin Islands interpreted 31 V.I.C. §231a. and identified certain procedures whereby the government may acquire real property other than by condemnation. In that case, the Court held that the Governor of the Virgin Islands needs prior authorization from the Legislature *before* he may seek to purchase real property and that once the Legislature has authorized the project, acquisition of real property is accomplished in two phases: the preparatory phase and the negotiation phase. *Id.* at 1126-1127. The Court explained the rationale behind this two-phase process and set forth that "[o]nce the Legislature has authorized a project which requires the acquisition of real property, it is the responsibility of the Executive to carry out the project. If the Legislature has not specified the property to be acquired, as in this case, the Executive must

involves a land exchange, 31 V.I.C. §205, which prescribes the requirements for the *sale, lease or other disposition* of government real property, must also be considered.

Title 31, Virgin Islands Code, section 205(f) states that "No portion of a "shoreline" as defined in section 402 of chapter 10 of Title 12 of this code, shall be sold, leased or otherwise disposed of by the Government of the Virgin Islands; excepting only leases for concession stands when such leases are approved in accordance with this section." Under 12 V.I.C. § 402(b) a shoreline is defined as "the area along the coastlines of the United States Virgin Islands from the seaward line of low tide, running inland a distance of fifty (50) feet; or to the extreme seaward boundary of natural vegetation which spreads continuously inland; or to a natural barrier; whichever is the shortest distance." Tract No. 02-101 Whistling Islands a/k/a Whistling

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first identify real property suitable for the project. It is then necessary for the Executive to obtain information as to the value of the property, so that negotiations for the acquisition can be intelligently carried out. Only after this initial phase has been completed can the second phase commence." *Id.*

In the current case, the Governor seeks ratification of an agreement for a property exchange that was negotiated *before* it was approved by the Legislature, so the procedures prescribed by 31 V.I.C §231a were not followed. In *All Star Corp.*, as in our case, the statutory procedures were not adhered to, and the defendant asked the Court to find the contract unenforceable due to the procedural error. The Court considered the gravity of the Government's failure to adhere to the statutory procedures and found that the contract that was negotiated was nonetheless enforceable stating:

"To accept defendant's theory as to the effect of these procedural missteps would be to render any government contract void ab initio where the preparatory phase is marred by a bureaucratic failure to observe relatively minor aspects of a statutory scheme. One must observe that such a rule cuts in both directions. If minor bureaucratic missteps can be used to make otherwise regular contracts unenforceable, the government will often find itself unable to enforce contracts which are vital to the welfare of the people." *All Star Corp. v. Government of Virgin Islands*, 483 F. Supp. 1125, 1126-1127.

In our case, the land exchange will allow the Government the opportunity to build a much-needed educational facility on St. John which is clearly vital to the welfare of the people of the Virgin Islands. While the proper procedures were not adhered to, this minor bureaucratic error is not fatal to the land exchange.

Cay is a shoreline as defined by 12 V.I.C. § 402(b), and the disposition of that property by the Government is therefore prohibited by 31 V.I.C. §205(f).

The prohibition against the demise of shorelines, however, does not foreclose the Legislature from changing the law to authorize the demise of Whistling Cay. In *Save Coral Bay, Inc. v. Bryan*, the Supreme Court of the Virgin Islands held that the Legislature has broad discretion in determining how it will exercise its power and authority to make the law. “This extraordinarily broad discretion includes how much deference—if any—the legislature gives to existing laws when enacting new ones. It is well-established, both in the Virgin Islands and throughout the United States that, in the absence of a constitutional restriction, one legislature cannot abridge the powers of a succeeding legislature by passing a law, adopting a rule, entering a contract, or taking some other action that irrevocably surrenders an essential attribute of its sovereignty. In other words, one legislature cannot enact irreparable legislation or limit or restrict its own power or the power of its successors and succeeding legislatures may repeal or modify acts of a former legislature.” *Save Coral Bay, Inc. v. Bryan*, 76 V.I. 505, 506.

To ratify the Governor’s approval of the proposed exchange of real property between the United States Department of the Interior, National Park Service, and the Government of the Virgin Islands, the Legal Counsel’s Office recommends the Legislature enact a statute that authorizes the exchange of the shoreline property, notwithstanding the current law. This would express the intent of the Legislature clearly to exempt the exchange from the prohibition and would avoid unnecessary challenges.

The U.S. Supreme Court, and the Courts of Appeals have interpreted notwithstanding language to supersede all other laws and have determined that the use of a notwithstanding clause “clearly signals the drafter’s intention that the provisions of the notwithstanding section override conflicting provisions of any other section.” *Cisneros v. Alpine Ridge Group*, 508 U.S. 10; *Liberty Maritime Corp. v. United States*, 289 U.S. App. D.C. 1, 4, 928 F.2d 413, 416 (1991).

Therefore, section 1 of BR23-0590 should be revised to read: “**Notwithstanding 31 V.I.C. § 205 (f)**, the Legislature of the Virgin Islands, pursuant to title 31, chapter 23, section 231a, subsection (f) of the Virgin Islands Code, ratifies the Governor’s approval of Preliminary Agreement for Exchange of Real Property Between the United States Department of the Interior National Park Service and the United States Virgin Islands a/k/a the Government of the Virgin Islands dated October 22, 2020 wherein the Government of the Virgin Islands will transfer Tract No. 02-101 Whistling Islands a/k/a Whistling Cay, Cruz Bay Quarter and identified on OLG Property as I.D 3-01701-0101-00 to the United States of America, Department of Interior, and the United States-Department of Interior, National Park Service will convey to the Government of the Virgin Islands a portion of Tract No. 01-137A Catherineberg (Hammer’s Farm) Cruz Bay Quarter, St. John Virgin Islands consisting of approximately 11.3 U.S. Acres more or less as identified on OLG Property I.D. 3-06201-0302-00.”

You may contact us with any concerns or questions.