

Legal Protection of Archaeological Remains on Private Property in the US Virgin Islands

By Kim Alderman

Note: This is a follow-up to the article published in the Spring 2010 VI Bar Journal titled "Legal Protection of Archaeological Remains on Public Property in the US Virgin Islands." The following article examines territorial laws protecting archaeological remains on private (rather than government-owned) real property.

The Antiquities and Cultural Properties Act

Archaeological remains on private property are protected by the Antiquities and Cultural Properties Act of 1998 ("the Act"), codified in Title 29, Chapter 17 of the Virgin Islands Code. The Act outlines consultation requirements for work done on privately owned land if the work affects archaeological resources. The Act also sets forth a permitting system for archaeological excavations.

As with regulations pertaining to public property, the State Historic Preservation Office ("SHPO") is responsible for administering the permitting and consultation systems described in the Act. The Act imposes stricter permitting and consultation requirements for private property listed on the Virgin Islands Registry of Historic Places ("Registry") than for non-Registry property.

Earth Change Permits

Sections 959(b) through (d) of the Act require that any person applying for an Earth Change permit for commercial purposes provide SHPO with a copy of the application, so that SHPO may consider the effect of the undertaking on Registry property. If SHPO has reason to believe that the undertaking may adversely affect a Registry property, then it may require the applicant to undertake a Phase I Cultural Resources Survey at his own expense. If SHPO reviews the Survey and concludes that a Registry property will be disturbed, it may make recommendations to the applicant on how to ensure preservation of the Registry property.

Permitting for Archaeological Excavations

29 V.I.C. §962 outlines the permitting system for archaeological excavations on any private land, regardless of whether the property is on the Registry. The permitting requirement applies to both terrestrial and submerged land, and the person wishing to excavate must submit an application to do so, which SHPO has discretion to grant or deny. The applicant must (1) have the authorization of the landowner, (2) be qualified to perform the excavation, (3) submit an excavation plan, and (4) report to SHPO on all findings. There is an ongoing conservation requirement for recovered materials in §962(c).

The §962 private land permitting system is less stringent than the one imposed for government-owned property, where a permit is required for activity that may incidentally disturb archaeological resources.

Discovery, Confidentiality, and Maintenance of Sites

There are several smaller provisions of the Act that apply to both Registry and non-Registry private property. Section 959(a) of the Act mandates that all private property owners notify SHPO upon discovery of any archaeological site on their property. Similarly, neither ownership nor Registry status is relevant to the §961 requirement on public officials to keep the location of archaeological resources confidential unless SHPO issues a written certification allowing disclosure. Finally, §959(f) states that the provisions of the section do not impair a landowner's right to perform maintenance on or repair to archaeological or historic property on his land.

Enforcement

29 V.I.C. §963 provides enforcement mechanisms for the Act. It is a criminal offense to violate a provision of a SHPO permit, exposing the offender to up to \$10,000 per day per violation and imprisonment of up to one (1) year. Any materials excavated in violation of a provision on the SHPO permit will be forfeited to the VI Government. The civil penalty for violating the Act, including failing to get a requisite permit, is a fine between \$100 and \$500 per day per violation. Accordingly, if a person is issued a SHPO excavation permit but fails to abide by its terms, he faces criminal exposure, but if he fails to apply for or is denied the permit, and excavates anyway, then he is subject to only civil penalties.

Pursuant to §963(c), SHPO must afford those accused of violating the Act with an administrative hearing before imposing civil penalties. The Superior Court of the Virgin Islands handles criminal prosecutions made pursuant to the Act.

The Act gives all residents of the Virgin Islands a right to request relief from the Superior Court if there is a violation or threatened violation of the Act. The Court may issue an injunction and order compliance with the Act if appropriate. Landowners are specifically protected by §959(e), as it is a civil violation to interfere with archaeological remains on private land without the owner's permission.

Building Permits

The use of Registry property is also regulated in Public Law 2258 (29 V.I.C. §§280-288).

29 V.I.C. §285(a) provides that no Registry property may be altered, restored, moved, or destroyed without an appropriate building permit. The articulated requirements are strict; a permit is required even to display a sign or light on a Registry-listed historic property. Interiors of buildings listed on the Registry are not supposed to be modified (or even "decorated") without a building permit.

The Department of Planning and Natural Resources ("DPNR") is tasked with issuing building permits, and pursuant to §386, is required to consult with the Historic Preservation Commission ("the Commission") regarding building permit applications for Registry property. A hearing will be held on the permit application and applicants may present their plans to SHPO directly. If the Commission disproves of the plans, it must record a decision and make recommendations. Any work should be completed in accordance with those recommendations.

If the Commission fails to notify an applicant of a determination on his permit application within sixty (60) days, then the application and plans are deemed approved by SHPO pursuant to §286.

Appeals from Commission decisions are made to the Board of Land Use Appeals (“the Board”) pursuant to 29 V.I.C. §287. In past cases where the Board has been unable to consider the appeal due to inability to generate a quorum, the District Court of the Virgin Islands has assumed federal question jurisdiction pursuant to 28 U.S.C. §1331, stating that due process rights are implicated.

Conservation Easements

The Uniform Conservation Easement Act (“UCEA”), codified in Title 12, Chapter 15, also provides for the protection of archaeological remains on private land to the extent that it allows for the creation of conservation easements. Conservation easements are nonpossessory interests in property that impose limitations or obligations pertaining to the property, often including preserving archaeological or historic aspects of the property. Government entities and charitable associations are eligible to hold conservation easements, and the easements are unlimited in duration pursuant to the UCEA. Any person with an interest in the real estate or conservation easement may bring an action to enforce the easement’s provisions.

About the Author

Kim Alderman is a VI-licensed attorney and a Clinical Associate Professor at the University of Wisconsin Law School. She clerked for the late Judge Francis J. D’Eramo on the island of St. Croix. She maintains The Cultural Property & Archaeology Law Blog at <http://www.culturalpropertylaw.net>.