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New suit filed to force deJongh to release draft constitution

By MEGAN POINSKI

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The convention's second petition for a writ of mandamus was filed in St. Croix Superior Court on Tuesday. The lawsuit - filed in the name of the Fifth Constitutional Convention, Convention President Gerard Luz James II, and Convention Secretary Mary Moorhead - asks the court to force Gov. John deJongh Jr. to send the document to Washington as required by law.

A similar lawsuit was filed in U.S. District Court on June 12 - about 24 hours after deJongh announced that the constitution drafted by delegates did not meet legal standards and therefore should not be sent to Washington to continue the approval process.

"This is just to cover our bases," James said Thursday.

The new lawsuit is quite a bit longer than the one filed in District Court last month, but the argument is similar. James has also hired attorney Emile Henderson III to represent him in the Superior Court case. Henderson will also be representing James, Moorhead and the Constitutional Convention in the District Court case. James said he is paying for Henderson's services himself.

"A wrong has been committed. It needs to be corrected," James said. "The law is clear."

There are two different laws at play in this case. The territorial law that established the Fifth Constitutional Convention gave delegates until May 31 to complete a draft constitution. The document, which passed out of the convention with a 20-5 vote on May 26, was passed along to deJongh on June 1.

The federal law setting up the constitutional process says that the governor has 10 days to forward the proposed constitution to the U.S. president for his consideration. Before forwarding the document, deJongh asked Attorney General Vincent Frazer for a legal opinion on whether the document met all of the requirements set forth in the both federal and local laws.

According to the federal law, the document must recognize and be consistent with the

United States' sovereignty over the territory and the supremacy of the U.S. Constitution, as well as federal treaties and laws applicable to the territory. The document also must provide for a republican form of government with executive, judicial and legislative branches. It needs to have a bill of rights and provide for a system of local courts.

The law passed by the 25th Legislature in 2004 that established the Fifth Constitutional Convention also requires that the document provide a procedure for amending the constitution and an effective date for the document.

In his legal opinion, Frazer said he believes the constitution falls short of those requirements in several aspects - especially with provisions that grant exclusive rights to people who can be classified as native Virgin Islanders, which Frazer said violate federal equal protection laws.

DeJongh said because the document does not meet the legal requirements, federal law does not require him to send it to Washington. The law is silent on what he should do in this case, deJongh said.

The Superior Court lawsuit argues that the law does not allow deJongh to do nothing with the document. Neither the federal, nor local law "provide that the governor of the Virgin Islands shall have the authority to amend, modify, veto or withhold a proposed constitution duly passed by the convention," the suit states.

The lawsuit charges that deJongh's failure to forward the document to the White House "has in effect precluded the people of the Virgin Islands from completing the process of putting into place a Virgin Islands Constitution." The only possible remedy is to force the governor to follow the law, the suit states.

Government House spokesman Jean Greaux Jr. said that the governor received the lawsuit on Wednesday. DeJongh, Government House legal counsel, and the V.I. Justice Department are currently reviewing it. Until the legal review is finished, Greaux said, Government House has no comment on the filing.

DeJongh's reply to the Superior Court lawsuit may be similar to his response to the District Court version of the lawsuit. On Thursday, Assistant Attorney General Carol Thomas-Jacobs filed a motion in District Court to dismiss the case.

A 20-page memorandum of law details several reasons why the government believes the Constitutional Convention's lawsuit should be dismissed.

The matter of whether to send the constitution to Washington was left up to the executive branch of government, the memorandum states, and the courts should not intervene.

"The court should not second-guess the actions of the governor or substitute its judgment for that of the executive branch of government when the matter is properly

entrusted to that branch of government," the memorandum states. "Gov. deJongh exercised his discretion and decided not to forward the proposed constitution to the president because it does not comport with its enabling legislations and ignores the mandates of the U.S. Constitution."

The memorandum also questions the validity of the parties in the lawsuit. It questions how the Fifth Constitutional Convention could be bringing a lawsuit forward. In the legislation creating it, the Constitutional Convention was given no power to sue or be sued. Plus, the argument continues, the way that the suit was filed is suspect.

"There is no evidence that the members of the Fifth Constitutional Convention ever gave James and Moorhead permission for filing a lawsuit on behalf of the Fifth Constitutional Convention," the response states. "In fact, such permission could not have been granted since the Fifth Constitutional Convention went into recess on May 31, 2009, and has no authority to reconvene to take legal action."

The response also states that neither James nor Moorhead establish in their lawsuit why the governor's action has harmed them personally, and case law prohibits individuals from filing lawsuits against the government with general allegations that the law is not being followed.

It goes on to argue against the lawsuit because District Court has no jurisdiction over the matter and that the governor never received a proper summons.

- Contact reporter Megan Poiniski at 774-8772 ext. 304 or e-mail mpoiniski@dailynews.vi.