IN THE SUPREME COURT OF

THE TURKS AND CAICOS ISLANDS

IN THE MATTER OF AN APPLICATION BY ERIC JOHN LEVIN, DANIEL JOSEPH LEVIN, AND THE PROPRIETORS, STRATA PLAN NO. 84 FOR JUDICIAL REVIEW

CL 24/20

BETWEEN

REGINA

(ex parte (1) ERIC JOHN LEVIN;

(2) DANIEL JOSEPH LEVIN;

(3)THE PROPRIETORS STRATA PLAN NO 84) APPLICANT

AND

1. THE DIRECTOR OF PLANNING

2. THE CABINET OF THE TURKS AND CAICOS ISLANDS

3. THE PHYSICAL PLANNING BOARD

4. HIS EXCELLENCY THE GOVERNOR

OF TURKS AND CAICOS ISLANDS RESPONDENTS

AND

THE YARD LIMITED INTERESTED PARTY

CORAM AGYEMANG CJ

MR. JONATHAN KATAN QC FOR THE APPLICANT

MS. LIBBY CHARLTON FOR THE RESPONDENTS

MR CONRAD GRIFFITHS QC FOR THE INTERESTED PARTY

HANDED DOWN ON: 14 SEPTEMBER 2020

JUDGMENT

1. This application, brought pursuant to leave to do so, granted on 13th of February 2020 by Ventour J, seeks the judicial review of the decision of the Physical Planning Board (third respondent) to grant an Outline Development Permission (ODP) in relation to Parcel No. 60801/76 measuring 6.83 acres, located at Lower Bight and Thomas Stubbs, Providenciales, to The Yard Ltd (Interested Party) upon its application (No PR 13997).

2. The process of making the impugned decision, which included reliance on the input (decisions) of other institutions and/or persons, is also the subject of this application.

The said interrelated decisions are:

i. The decision of the first respondent (Director of Planning) to:

Accept an application for development in the form of an application which included an application for Change of Zoning, and/or;

ii. Refer the application to the 3rd respondent for consideration;

iii.The decision of the second respondent (Cabinet), or alternatively the 4th respondent (His Excellency the Governor in Cabinet) of the 6th of November 2019 to: grant conditional approval (Outline Development Permission) to the Interested Party in respect of Application PR 13997 for the rezoning of Parcel No. 60801/76 from (R4) medium density residential (3-6 units per acre) to (TO1) Tourism related Development in order to construct a full service hotel;

iv. The decision of the 3rd respondent (The Board) to: Grant Outline Development Permission in respect of Application No. 13997 on the 21st

of November 2019 which is stated as granting approval in principle to the Interested Party to undertake the following development: "Six (6) Story Hotel Development Consisting of 87 bedrooms, Swimming Pools, Reception, Restaurant, Bar, Gym, Kid's Centre, Spa and Villas";

v. The decision to determine the application without first having required to be provided with an Environmental Impact Assessment (EIA) and a Comprehensive Impact Assessment (CIA)

3. Having regard to the matters of complaint in respect of the aforesaid decisions, the instant application seeks the following reliefs:

a. *A declaration that the Director of Planning should have refused to consider the application for rezoning, as it was not an application for development permission within the meaning of section 41 of the Physical Planning Ordinance, CAP 9.02 (PPO);*

b. *A declaration that the Cabinet and /or The Governor in Cabinet, does and did not have jurisdiction to grant outline development permission for the rezoning of parcel 60801/76 the Bight and Thomas Stubbs, Providenciales ("the Proposed Development Property");*

c. *A declaration that the Board's decision is irrational in that it took into consideration the decision of the Cabinet and/or failed to consider properly or at all, the representations of the Applicants and other representations and objections made to it in relation to the application;*

d. *An order of certiorari to quash decisions 1-5 above;*

e. *Further or alternatively, a declaration that the purported decisions 1-5 above were ultra vires;*

f. *Further or other relief.*

4. As a preliminary matter, I will set out definitions as they are used in this judgment:

Any reference to 'Development Plan', 'Approved Plan' or 'Plan', is reference to the National Physical Development Plan or the Providenciales Physical Development Plan. This plan includes the Development Plan refers to Land Use Zoning Plans.

S. 2 of the PPO defines Governor as: Governor in Cabinet.

Every reference to the Governor, or the Cabinet, is therefore reference to the Governor in Cabinet.

These are the matters antecedent to the application:

APPLICATION FOR THE GRANT OF AN ODP

5. On 18th of December 2018, The Yard Limited (Interested Party), began an application for an Outline Development Permission (ODP). The application, which was completed on the 18th January 2019 with the submission of filled out forms, plans and other relevant documentation, was made to the third respondent: The Physical Planning Board (referred to alternately as the Board, or the third respondent). It was in respect of the development of Parcel No. 60801/76, The Bight, Providenciales, by the construction of an 87-bed hotel with ancillary services (the first phase of an eight-phase development project).

6. The ODP was granted subject to sixty-four conditions on the 8th of November 2019 (or 21st of November 2019 as the case may be – the difference in dates will be discussed later in the judgment). It was also indicated that the other phases (seven of them) of the proposed development were to be the subject of separate applications.

PUBLICATION OF THE GRANT OF AN ODP

7. The third respondent after the grant of the said ODP, published a notice, providing details of the grant of the ODP in respect of Parcel No. 60801/76 to the Interested Party.

The notice read inter alia: *"…the Board hereby GRANTS in accordance with the terms and conditions authorised by the Ordinance, approval in principle to undertake the following development:*

Six (6) Story Hotel Development Consisting of 87-bedroom, Swimming pools, Reception, Restaurant, Bar, Gym, Kid's Centre, Spa and Villas.

as described in [the] application for a grant of an outline development permission dated 18th January 2019 and, in the plans, and drawings attached thereto, subject to compliance with the relevant statutory provisions and with the following conditions…"

The grant was made subject to sixty-four conditions.

THE PROCESS OF THE CONSIDERATION OF THE APPLICATION:

PLANNING DEPARTMENT CONSULTATION

8. On 21st January 2019, upon receipt of the application, the first respondent (the Director of Planning) through whom the application had been made, caused the application to be sent to relevant stakeholder institutions/departments: Department of Environmental and Coastal Resources (DECR), Department of Disaster Management and Emergencies (DDME), and the Chief Fire Officer, for their comments. The subject of the consultation was described as: *"PR Application 13997 Full Service Hotel With Eighty-Seven (87) Bedrooms, Six stories Plus Basement Including Swimming Pools, Reception, Restaurant, Bar, Gym And Kids' Center Spa And Villas."*

ADVERTISEMENT OF THE APPLICATION

9. On that same day: (21st of January 2019), officials of the Department of Planning corresponded with, among others, the Interested Party's Attorney, Mr. Gordon Kerr, advising him of his obligation to advertise the application for the ODP. This was followed up with a letter of 22nd

February 2019, under the hand of one Ms. Tshora Hyman, advising the Interested Party to advertise the application for twenty-eight days in the following places: the TCI Gazette; a local newspaper in circulation in the Islands; by the erection of a notice of the development site, and by service of notice to all parcel owners within two hundred (200) feet of the area of the proposed development.

10. In that letter, the type of development was described as: "Change of Zoning from Medium Density Residential to Tourism Related Development for a Full-Service Hotel with Eighty-Seven (87) Bedrooms Six Stories plus Basement including Swimming Pools, Reception, Restaurant Bar Gym and Kids' Center, Spa and Villas".

11. The application was duly advertised by the Interested Party in the TCI Gazette on at least three dates: 31st May, 7 June, 28th June 2019, and in the Turks and Caicos Sun newspaper, in the May 3-10, and 10-17 publications. Adjoining landowners and owners of land within two hundred feet of the proposed development, were served with the notice of the application. The notice of the application was also affixed and displayed on the parcel of land: 60801/76.

12. The wording of the advertisements would be somewhat disconcerting to the discerning reader, for two different advertisements were put out by the Interested Party:

In the 15-22 March 2019 edition of the Turks And Caicos Sun, as well as notices in The Gazette of 31st May and 7th June 2019, the notice read:

"Regulation 7 of the Physical Planning (Development Permission) Regulations, 2014

An Application REGISTERED PR 13997, by THE YARD LTD for the development of a Full Service Six Story Hotel has been submitted at the

Department of Planning for consideration of Development Permission on 60801/76 Lower Bight Road on Providenciales.

The application as submitted seeks planning consideration for Change of Use from Medium Density Residential to Tourism Related Development for a Full-Service Hotel with Eighty-Seven (87) Bedrooms, Six (6) stories plus Basement including Swimming Pool, Reception, Restaurant, Bar, Gym & Kids Center, Spa and Villas.

Anyone wishing to make representation(s) may do so in writing to the Director of Planning, South Base, Grand Turk or through the Department of Planning Emily House Providenciales within twenty-eight days of the publication of this notice…"

13. On the 15th of April 2019, Mr Ogail Awad, Deputy Director of Planning, sent the following email to the Interested Party's architect Simon Wood:

"Dear Mr Wood:

With respect to the above referenced planning application, please note the following: The existing advertisement has an error. It is written "change of use" instead of "change of zoning".

To enable the Department of Planning to proceed with this planning application, you are required to advertise the subject planning application in accordance with the attached correspondence..."

14. In response to this communication, the May 3-10 and May 10-17 editions of the Turks and Caicos Sun, on the notice affixed on the property, as well as in the final public notice of The Gazette – 28th June, the advertisement put out by the Interested Party was in the following terms:

"Regulation 8 of the Physical Planning (Development Permission) Regulations, 2018

An Application REGISTERED PR 13997, by THE YARD LTD for the development of Change of Zoning from Medium Density Residential to Tourism Related Development For a Full Service Hotel with Eighty-Seven Bedrooms, Six (6) stories plus Basement including Swimming Pool, Reception, Restaurant, Bar, Gym & Kids Center, Spa and Villas, has been submitted to the Department of Planning for consideration of Development Permission on Block and Parcel (TITLE No.) 60801/76, THE BIGHT & THOMAS STUBBS, Lower Bight Road, Providenciales.

Anyone wishing to make representation(s) may do so in writing to the Director of Planning, South Base, Grand Turk, or through the Department of Planning, Leeward Highway, Emily House, Providenciales, within twenty eight (28) days of publication of this Notice"

15. Documents exhibited in these proceedings have revealed that the content of the Gazette notice of the 28th of June 2019 (and in the later editions of the newspaper and on the notice affixed to the land), was approved by officials of the Department of Planning after a number of revisions.

16. The reason for the insistence of officials of the first defendant that for transparency, the words: "Change of Zoning", rather than "Change of Use" be inserted in the advertisement, was this: that the development application, being one for the construction of a full service hotel with ancillary services on land designated for residential use, required the designated use of the parcel of land to be changed from: medium density residential (3-6 units per acre) (R4), to (TO1) Tourism Related Development.

OBJECTIONS BY MEMBERS OF THE PUBLIC/PROPERTY OWNERS

17. After the advertisement, some residents and owners of land in the vicinity: Rev. Daniel Delancy, on 31st January 2019 and 4th April; Hudson Delancy on 26th February 2019; Collen Delancy on 2 April 2019; Mr. Katan QC on behalf of Strata Corporation (3rd respondent) on 22nd May; Christine C. Levin on 28th May; Daniel J. Levin on 27th May 2019, Agile Levin on 28th May 2019, and Mr. Chuck Hesse on 31st May 2019, made representations to the third respondent by which they objected to the grant of the application for ODP.

18. The objections were made ahead of the third respondent's meeting scheduled for the 25th of July 2019. The objections to the proposed development spanned personal, economic, and socio-cultural, and environmental concerns, and were strongly worded.

19 Mr. Eric LeVin alone presented about eight papers on his objections. Mr Chuck Hesse also made objections and provided an executive summary of his detailed objections. The said gentlemen also appeared before the third respondent (the Board), to make oral representations at its meeting of the 25th of July 2019.

20. The main objections are condensed as follows:

a. One property owner's objections included an assertion that the form for the application: DOP 1, DOP 2, and the plans submitted by the interested Party were incomplete, and contained false information of a material nature;

b. Another alleged that the development would affect vehicular traffic (as south border of the parcel had only a very narrow direct connection to the Leeward Highway, too close to the roundabout to make a safe entrance and exit);

c. Other objections included:

i. that the proposed development would significantly worsen the existing parking;

ii. that it would also infringe on the privacy of the existing and upcoming residents of the area, thereby affecting their quality of life.

iii. that the proposed development would create nuisance to residents and property owners, and lead to a loss in property values.

iv. that it would generate pollution, noise, dust, extra flooding caused by parking lots, likelihood of parking lot oil contaminant running off onto adjacent lands;

v. that the proposed development was not in conformity with the zoning requirements, and that there was no mechanism to change existing zoning;

vi. that Spot zoning is deprecated in many jurisdictions and should not be entertained as a planning concept in TCI.

vii. that the application was contrary to law, as "Change of Zoning" was not provided for in the Physical Planning Ordinance, and was also contrary to local and international instruments such as: the Providenciales Development Manual 1987, the Rio Declaration und the Environmental Chapter by reason of destruction and mutilation of the Environmental Heritage North Shore Ridge Special Landscape Feature, and the Plant Health Ordinance, because of the consideration of a future farm;

viii. that the proposed development would be out of alignment with "Vision 2040", which was aimed at developing 'wholesome sustainable neighborhoods that are synergistic with related Businesses";

ix. that the Interested Party was allegedly looking to relocate residents from the area;

x. that the property would not have direct beach access, thus compromising the public Children's Park and designated open space;

xi. that the increased use of the Children's Park by the hotel's guests would compete with the existing public access and was likely to have a detrimental impact on the public's access and enjoyment of the beach. There was also the expressed fear that the proposed hotel might treat this public area as part of the hotel's facilities;

xii. that the development would be destructive of the existing natural environment and steep slope front ridge, thus requiring an Environmental Impact Assessment (EIA) before the grant of outline development;

xiii. that the proposed development would be an eye sore, sticking out as an "ugly disgusting freak" and was likely to lead to a loss of property values;

xiv. that there was already sufficient tourism related development zoning in Providenciales on more appropriate parcels, therefore, it would allegedly, be "arbitrary, capricious, unreasonable, unjustifiable, unfair, non-democratic, corrupt and contrary to the public welfare and the environment" to grant the application.

21. The Delancy family members (three of the objectors) later withdrew their objections. It was alleged that they did so when it came to light that they had rented part of their land to Wymara Hotel for a car park.

BOARD (INSTITUTIONAL) CONSULTATION

22. In order to carry out its responsibilities, S. 47(2) of the PPO, provides that advice be provided by the Director of Planning (first respondent). The

Director of Planning in the performance of this duty, reached out to stakeholder agencies for their input. As aforesaid, DECR and DDME provided input at length.

DECR INPUT

23. In a twelve-paragraph document, the DECR recommended *inter alia,* that the nature of the application required the conduct of a Comprehensive Impact Assessment (CIA) which should include a geotechnical study, assessment of environmental impact on flora and fauna, human health, socio-economic considerations (with mitigation of identified issues or a mitigation plan).

In DECR's words: *"The type of development and the location requires a Comprehensive Impact Assessment (CIA) to be conducted by qualified, experience [sic] and independent professionals.*

The Terms of Reference for this project shall be drafted by DECR in cooperation with the Department of Planning and other concerned TCIG departments and units. All policies on CIA/EIA/EIS shall apply"

24. DECR also recommended among others, that the hotel be constructed using green technology, and that no invasive plants were to be imported; rain water harvesting, proper water utilization should be encouraged and waste management should be addressed. In its concluding remarks, DECR stated that

"The DECR recommends that the deliberation of this application be held in abeyance pending satisfactory compliance with the comments and recommendations mentioned above."

DDME INPUT

25. The DDME also gave its input in a sixteen-paragraph document which was concerned with the provision of an Emergency Response Plan (Disaster

Plan) before the issuance of a Building Permit. Provision for storm drainage (for flooding), waste management facilities were also recommended.

FINANCE INPUT

26. The Permanent Secretary of Finance indicated that he/she had no input to make, as there were no financial implications for the country.

INVEST TCI INPUT

27. Invest TCI had no involvement in the process and provided no input, except to enquire as to the legal underpinnings of granting a rezoning application.

CERTIFICATE OF APPROVAL

28. On March 4, 2019, the Minister for Infrastructure, Housing, Planning and Development) issued a certificate of approval (DOP Form 33) for the proposed development, in accordance with S. 44(1) of the Physical Planning Ordinance (PPO).

THE MEETING OF THE BOARD

29. The Board (third respondent) held a meeting on the 25th of July 2019 and considered the application. Two of the objectors were also at the meeting to add oral representations to their written ones. The Board was furnished for its consideration, a Report compiled pursuant to the duty of the first respondent under S. 47(2) of the PPO to advise the Board in its work. The Report, which was prepared by one Carlos Tamayo (now deceased), recommended the conditional approval of the ODP application. It also included sixty-two paragraphs of recommendations as conditions for the due execution of the project.

30. The matters pertinent to the application which were addressed in the said Report, included: the objections/concerns of landowners in the vicinity of

the proposed development, as well as the concerns and recommendations made by the DECR and DDME.

31. In a segment titled: "Department of Planning Considerations", it was stated among others that: *"The proposed development [had] to be treated as an Outline Development Permission for change of zoning from (R4) Medium Density Residential (3-6 units per acre to (TO1) Tourism Related Development)".* The said "Planning Considerations" echoed the DECR recommendation: that a Comprehensive Impact Assessment (CIA) was required to be conducted by qualified, experienced and independent professionals with terms of reference for the project, drafted by DECR in cooperation with the Department of Planning and other concerned TCIG departments and units, and with all policies of CIA/EIA/EIS, applying.

32. The Report also contained information on the density of the project on site, site coverage, access to development, parking, beach access, sewage system, drainage, and a proposed community project under S. 46(1) of the PPO.

33. After its deliberation, the Board reached a decision to conditionally approve the application for the grant of the ODP which was found to be inconsistent with the present land use contained in the National Physical Development Plan.

34. Because of the inconsistency, the Board referred the matter to the Minister for Infrastructure for transmission to the Governor in Cabinet who alone could approve the grant of a development permission inconsistent with the current use of the land.

THE MINISTER

35. The Minister of Infrastructure, Housing And Development Planning submitted the application along with a confidential document which

contained a comprehensive account of matters pertinent to the application, to the Governor in Cabinet for consideration. These pertinent matters included the objections raised by property owners, the concerns and recommendations of relevant Government Departments, and answers he had received from the first respondent through his Permanent Secretaries to the questions he had referred to them from members of Cabinet.

36. It is manifest from emails sent by the Minister on 23rd of October 2019, to his Permanent Secretary and his Deputy Permanent Secretary: Ian Astwood and Desmond Wilson on the subject, that the Minister was seized with the matter, for he relayed questions posed by members of Cabinet and sought answers.

THE GOVERNOR IN CABINET

37. In order to give clarity regarding the matters placed before Cabinet for consideration, some important detail contained in the confidential document must be set out.

The subject was stated to be: *"Consideration of Planning Application PR 13997 (Outline Development Permission), for the rezoning of parcel 60801/76 from (R4) medium density residential (3-6 units per acre) to (T01) Tourism Related Development, in order to construct of a full service hotel in parcel 60801/76, The Bight, Providenciales."*

38. The matters to be decided were set out as: *"Consideration of Planning Application PR 13997 (Outline Development Permission), for the rezoning of parcel 60801/76 from (R4) medium density residential (3- 6 units per acre) to (TO1) Tourism Related Development, in order to construct of a full service hotel in parcel 60801/76, The Bight, Providenciales, which was submitted by The Yard Ltd. c/o Misick & Stanbrook in accordance with the provisions of Section 55 of the Physical Planning Ordinance 2014".*

39. The information provided therein included a reproduction of the objections of members of the public (landowners and resident in the vicinity) as well project details. These details provided a description of the proposed construction, physical issues sch as the access road to it, and beach access. The comments/concerns/recommendations by relevant departments: DECR (supra), DDME (supra), Invest TCI (supra), and the Director of Planning (first respondent) were also included.

40. Certain members of Cabinet posed questions arising out of the complaints. These were forwarded to the first respondent who gave answers to them. These questions were:

"1. What level of engagement have we done with the persons objecting to the application?

• Planning response: Persons objecting to the application were able to review the plans submitted with the subject application and to submit their concerns and objections to the department, which were evaluated and considered during the process of evaluation and approval of the proposal. At the same time, the persons objecting to the application were invited to make their representations at the meeting of the Physical Planning Board (July 25th, 2019) where the application was considered.

Planning response: Rezoning is not considered as a type of development. In accordance with section 2.6.1 of the Development Manual, 2014 (Purposes for which development permission may be granted), development permission shall be granted for the following:

a) Outline Development Approval;

b) Detailed Development Permission;

c) Permission to subdivide land;

d) permission to display an advertisement

e) Wells

Change of use/Zoning doesn't exist in the Physical Planning Ordinance or the Development Manual, therefore, there is no legal framework for processing an application for the change of use/rezoning. The rezoning is a required step when the proposal is not consistent with the existing land use zoning for the area where the development is proposed to be located. The Physical Planning Board doesn't make final decisions on land rezoning, just recommendations to the Governor in Cabinet, who is the only one who can approve it, in accordance with the provisions of Section 39 (2) of the Physical Planning Ordinance 2014.

3. Parking requirement – the paper states that the law requires 58 spaces base on the number of rooms however, the paper says that it only have 52 spaces available for the rooms and 28 available for staff. This implies that that the project is not meeting the requirement.

Planning response: The department agrees with this comment. The applicant will be required to submit revised drawings of the application reflecting the total parking spaces required by the proposal (58), in order to be considered in the review and approval process for Detailed Development Permission (DDP)

4. It was brought up that the Delancey family who makes up most of the objectors) as recently rented out a part of their land to the Wymara Resort for a parking lot. This should be added to the paper to assist with justifying the rezoning. Include a picture."

41. The first respondent also provided a document that was aimed at providing answers to the concerns/complaints of objectors. I reproduce the contents:

"<u>Planning Considerations on major concerns and objections</u>

The subject area is zoned for residential development

- *Although the area is zoned for residential development is not a residential area at this time.*
- *There is a gas station in the area and the land located considered for commercial development.*
- *The density of the new development will be low (87 bedrooms in 6.83 acres).*
- *There has not been any recent planning application for the construction of residential buildings for the subject area, only for a subdivision.*

"Change of Zoning" and similar terms do not exist in the Physical Planning Ordinance.

- *The subject application is not for rezoning, but for Outlined Development Permission for a hotel development. Considering that the proposal is not consistent with the existing land use zoning for the area, for more transparency, the applicant was advised to mention the zoning in the advertisement.*
- *The rezoning is a required step when the proposal is not consistent with the existing land use zoning for the area where it is proposed to be located.*
- *The Physical Planning Board doesn't make final decisions on land rezoning, just recommendations to the Governor in Cabinet, who is the only one who can approve it, in accordance with the provisions of Section 54 of the Physical Planning Ordinance 2014.*

The development will infringe on the privacy of the existing and upcoming residents. The property is elevated and there will be significant noise pollution, air pollution and nuisance. During construction there will be noise and dust.

– *The orientation, design and landscape of the proposed building will mitigate the impact of the development on the area.*

- This type of development does not generate a significant level of noise. Noise levels will be similar to that generated in other similar facilities on the island.

-The required Environmental Impact Assessment that shall be prepared for this proposed development will evaluate all this impacts and propose mitigation measures.

The development will create parking problems in the area

– The proposal includes all required parking spaces. Besides that, a condition to be imposed is that no parking will be allowed on the adjacent roads.

The property does not have direct beach access. Beach access will be via the public Children's Park and designated open space.

-The existing beach access is public. Besides that, the applicant will upgrade and maintain the botanical garden in agreement with DECR. As part of the approval process, the applicant shall develop a community project, in accordance with Section 46(1) of the Physical Planning Ordinance 2014. The upgrading and maintenance of the botanical garden could be the required community project, for which the applicant shall submit a proper planning application. The aforesaid plan shall be developed and implemented on the expense of the applicant.

The increased use of the Children's Park by the hotel's guests will compete with the existing public access and is likely to have a detrimental impact on the public's access and enjoyment of the beach.

- All guests staying in hotels on the beach and inland, as well as other visitors and residents, have full right to the use of the beach, which is public.

Building a high rise on the ridge destroys the protected residential atmosphere, and also blocks the ocean views of a large number of residential parcels.

- *The required Environmental Impact Assessment that shall be prepared for this proposed development will propose mitigation measures.*

It is notable and wrong that an environmental impact assessment, including a socioeconomic study, which is required by the Physical Planning Ordinance, was not submitted in this case.

- *The preparation of an Environmental Impact Assessment is part of the approval process of an Outline Development Permission. It is recommended to the applicant after the submission of the application for ODP. The Department of Planning and other relevant departments should be involved in the preparation of the Terms of Reference for the preparation of the EIA and the approval of the professional team responsible for its preparation.*

The proposed rezoning and the associated development (PR 13997) are inconsistent and are destructive of the existing natural environment und steep slope front ridge.

The required Environmental Impact Assessment that shall be prepared for this proposed development will evaluate this aspect and propose mitigation measures.

There is already sufficient "tourism related development" zoning in Providenciales on more appropriate parcels.

It is economically desirable to move from the current model to a mixed use model of condominium and traditional European Plan of high end hotels. It was expected that this would result in an increase number of hotel rooms to cater to the expected increase of visitors. This change in

policy was expected to create greater consistency in the inventory of rooms available as hotel rooms. It was the expectation of the TCIG that the proposed change might lead to luxury brand hotels investing in the Island and that this would inevitably lead to global recognition of the Turks & Caicos Islands.

The PR 13997 application does not have appropriate and legal road access.

– In order to access from the Leeward Highway on the East side of the development, an agreement was necessary with the owners of adjoining land parcel 60801/12. An agreement has been executed for an easement across this parcel, an easement that will allow for building a twenty feet wide driveway to access the hotel site. The easement across parcel 60801/12 automatically "extends its rights of easement over the narrow parcel 60801/73 to the invitee (the development parcel 60801/76). Ref. attached letter from Missick and Stanbrook (GWK/kb/ZNFH13708). A right that is already established to the west regardless.

The Planning Department should not entertain "spot-zoning" (rezoning) as a planning concept.

– The rezoning is a required step when the proposal is not consistent with the existing land use zoning for the area where it is proposed to be located.

- The Physical Planning Board doesn't make final decisions on land rezoning, just recommendations to the Governor in Cabinet, who is the only one who can approve it.

PR 13997 should be refused since the new Physical Development Plan is not finished.

-The Physical Planning Board doesn't make final decisions on land rezoning, just recommendations to the Governor in Cabinet, who is the only one who can approve it.

g. Legal implications: This paper does not impact changes in legislation.

h. Risk assessment: There are no immediate, apparent Risks foreseen to the TCIG."

42. On 6th of November 2019, Cabinet communicated its decision on the matter per an Action Point authored by the Clerk to the Cabinet, for the attention of the Permanent Secretary of the Ministry of Infrastructure. It was said to precede a formal Action Minute (there is however, no evidence that the promised formal Action Minute was ever sent). The Action Point was under the heading: "Subject: Consideration of Planning Application PR 13997 (Outline Development Permission)".

The Action Point read:

"Please be advised that Cabinet at its meeting today discussed the above captioned subject matter which was submitted for round robin consideration and advised that: It granted conditional approval of planning Application No PR 13779 (Outline Development Permission) for the rezoning of parcel 60801/76 from (R4) medium density residential (3-6 units per acre) to (TO1) Tourism Related Development in order to construct a full service hotel in Parcel 60801/76…"

THE GRANT OF THE ODP

43. On the 8th of November 2020, the third respondent (the Board) granted the application for the Outline Development Permission and published it in a Notice of Grant.

LETTER BEFORE ACTION

44. Following the publication of the grant, a formal pre-action letter was written on behalf of the applicants by learned counsel Mr. Katan QC, to the Department of Planning, and to His Excellency the Governor. No response was received. Another letter, written to the Attorney General was followed by some further communication between Mr. Katan QC, and the Attorney General's Chambers. Finally, a letter was received by Mr. Katan QC from present counsel for the respondent. I reproduce the relevant content as follows:

"…Alas I cannot agree with your position that the decision to grant permission for rezoning is unlawful and ultra vires. I would invite you to consider inter alia section 39(2 and 39 (3) of the PPO. I can confirm that a Ministerial Certificate of Approval in accordance with section 43(2) was issued…I include a copy of the Departmental Planning Review which I hope will shed some light on important issues surrounding the grant of permission. I also include a copy of the Cabinet Action point of the 6th of November."

45. Upon receipt of this, the applicants applied to this court for leave to bring the instant application for judicial review.

GROUNDS FOR SEEKING RELIEFS

46. This application seeks the reliefs set out before now, on the following grounds:

1. The Application was wrongly treated by the Director/Board/Cabinet as (i) an application for ODP for rezoning or (ii) which included and/or which required change of zoning.

2. Any referral made by the Board to the Minister was based on an error of law i.e. the Application had to be treated as ODP for, including or requiring a change of zoning.

3. The decision of the Cabinet to grant, "conditional approval of Planning Application PR13997 (Outline Development Permission) for the rezoning of Parcel 60801/76 from (R4) medium density residential (3-6 units per acre) to (T01) Tourism Related Development", for whatever purpose, was unlawful and ultra vires.

4. Further the Cabinet should not have considered the Application and/or made any decision without an EIA having been carried out.

5. Any decision made by the Board to grant ODP based on the Cabinet's decision was unlawful and ultra vires.

6. Any decision made by the Board not made at a meeting is ultra vires.

7. The issue of Grant of ODP by the Director was unlawful and ultra vires if issued without a meeting of the Board having taken place or after an ultra vires decision was made by the Board.

8. The Board should not (i) have considered the Application and/or (ii) referred the Application to the Minister and/or (iii) Granted ODP without an EIA having taken place as by doing so development permission was granted in principle without material information/matters being before the Board.

THE APPLICANTS' CASE

47. The first and second applicants describe themselves as the beneficiaries of The Richmond Trust which owns per its trustee: Coriats Caribbean Limited, parcels of land described as: 60714/111, 112, 113,119,123-139 and 141, Providenciales. The first applicant asserts that 60714/111 and 112 is in fact, his home.

48. The third applicant is the registered owner of Parcel No. 60802/65 being the common property of Wymara Hotel, and also party to a restrictive agreement in respect of 60812/34; both of them close to the area of the proposed development.

49. The case of the applicants, contained in their various affidavits, is mostly, what they allege to be the likely negative impact of the proposed development on their properties. These include the pollution during construction, noise, invasion of their privacy and consequent reduction of property values. In this regard, they fear that the development will compromise their quality of life in a place in which they had a legitimate expectation would remain residential.

50. They also challenge the legality of the grant of the ODP, asserting that an application for an ODP should not include an application for change of zoning which would lead to the "undesirable and wrong practice of spot zoning"; they charge that no EIA was conducted prior to the grant of the ODP, and assert also, that it was wrong to grant the ODP without a full public consultation (which they maintain is the procedure to be adopted under Part V of the Physical Planning Ordinance CAP 9.02); they further assert that their objections were not given due consideration, nor were the reasons for their rejection communicated to them.

51. In addition to these complaints in common, the third applicant: a hotel, makes complaints relating to the negative impact of the proposed development on its business. They assert that a change of zoning would set a bad precedent and would likely open the floodgates to other persons seeking change of zoning. This they say, may lead to more and more hotels and similar developments, in the area.

52. They also assert that the proposed development is likely to produce noise which will have a negative impact on the surrounding areas and result in an increase in vehicular traffic which will negatively impact the convenience of road users, and affect accessibility to their hotel.

53. Another feared consequence is the likelihood of overcrowding of that section of Grace Bay beach, which may cause damage to the Grace Bay luxury brand marketed internationally and in turn. The said possible damage may lead to a possible drop in the property value of their condominium hotel for individual owners, and room rates. They also complain that the planned use of 60812/34 as the access point to Grace Bay beach, may be inconsistent with a restrictive agreement to which it they are a party.

THE RESPONDENTS' CASE

54. Mr. Dainer Lightbourne (the first respondent) deposed to an affidavit (presumably for all the defendants), in which he narrated the events leading to the grant of the ODP by the Board, much of it has already been recounted.

55. It is the evidence of the first respondent, that the Board gave "full and proper consideration" to all the matters pertaining to the application, and recommending conditional approval, referred the matter to the Minister. The referral was made because of the implication of the application, which was: that being an application for an ODP for the construction of an 87-bed full service hotel in an area zoned as (R4) medium density residential (3-6 units per acre), was inconsistent with the land use zoning for the area. Thus, the consideration thereof, was said to necessarily require rezoning, a matter that could only be done under the specified procedure under S.39(2) of the PPO.

56. The said S. 39 (2) procedure required a referral by the otherwise approving Board, to the Minister, and through him, to the Governor in Cabinet for his decision which would come in the form of advice for the Board. The sought-for advice of the Governor in Cabinet, was relayed to the third respondent in the form of an Action Point of Cabinet of 6th November 2019. Following the said communication, the Board, on the 8th of November, granted the ODP subject to sixty four conditions. This was followed by terms of reference provided by DECR for an Environmental Impact Assessment EIA on 10th December 2019 which was forwarded by the Department of Planning to the said architects of the Interested Party: SWA for their guidance.

57. The first respondent explained that the decision not to require an EIA before the grant of the ODP, was in accordance with age-old practice. The reason for it, is that it involved substantial expense, and furthermore, required the issuance of terms of reference which required the input of stakeholders.

58. The first respondent explained further, that to require an EIA before the grant of the ODP would mean that the Department of Planning would issue terms of reference without first receiving input from key decision makers and other departments. He alleged that the decision was also guided by the holding of the Court of Appeal, that the timing was not important, as what was important was for it to be conducted before a final decision on the application was made.

59. The Interested Party offered evidence per the affidavits of John Redmond, an architect of considerable experience who has practised in this jurisdiction since 1986 and full time, since 1990 and gave technical evidence. Mr. Redmond deposed, that while he was not the architect who

made the plans and drawings for the instant application for ODP, he was qualified to, (and did) offer evidence in respect of his experience of planning history in TCI and applications inconsistent with the approved plan, as well as his knowledge of the area of the proposed development and the surrounding areas.

60. His evidence regarding the approved development Plan 1987-1997 which is still in force, and its derivative Land Use Plan echoed the evidence of the first respondent. While he deposed to a number of hearsay matters which will not be considered in this application, he gave valuable history regarding his work as an architect in TCI, first at Grand Turk and then at Providenciales.

61. Of significance is his evidence that the site of the proposed development is zoned for Medium Density Residential, in the Land Use Plan and, is said to include: "Commercial and Industrial Related activities, 3000 square feet and under"…In this regard, he averred that the proposed development is in fact close to the original intended use of the place as the predominant land use is already tourist-related, many hotels having been constructed and been in operation for many years on the opposite side of the road of the development site.

62. Of the first and second applicant's properties, he deposed that "the LeVin properties are zoned for "Tourism/Condos/Holiday Homes".

63. Regarding the history of applications for development permission inconsistent with the approved plan in TCI, Mr Redmond further deposed to what he said was first hand experience: essentially, an echo of the first respondent's evidence which was: that in his thirty years' experience as an architect in TCI with first hand experience of applications inconsistent with the approved plan (he gave examples of cases on his personal

involvement), he had never been asked to submit a separate application for a change of land use or zoning for such. Rather, that the procedure that had always been followed where such an application was made was for the Planning authorities to treat it as "engaging section 39 of the PPO and follow the procedure under section 39". The application would then be submitted to the Board which would follow the procedure under S. 39.

64. Of the requirement of an EIA, he stated, further echoing the first respondent, that it was in his experience, always issued after the grant of the ODP following which the planning authorities and the relevant agencies would provide the terms of reference to guide the applicant.

CONSIDERATION OF THE ARGUMENTS:

65. Learned counsel for the applicants, Mr. Katan QC, has set out his arguments under various heads and argued them seriatim. Learned counsel for the respondent, and for the Interested Party have also argued their cases along the same lines. I shall set them out as the issues for determination in this application, and in my consideration of them, make reference to the heads as argued.

HEADS OF ARGUMENT (AS ISSUES FOR DETERMINATION)

66. 1. Whether or not Cabinet has power to lawfully grant Outline Development Permission for a "rezoning" of land;

2. Whether or not the respondents failed to comply with Part V of the PPO in dealing with the application for ODP.

3. Whether or not there was a failure to give adequate reasons.

4. Whether or not the respondents breached the duty to secure consistency

5. Whether or not there was a failure to act in accordance with the development plan.

6. Whether or not the applicants had a legitimate expectation to live in a residential area

7. Whether or not the failure to require and consider an EIA should be fatal to the grant of the ODP

67. Regarding the decision of 8th November 2019:

1. Whether or not the Board's decision was irrational and had regard to irrelevant considerations.

2. Whether or not the Board breached its duty to exercise powers consistently.

3. Whether or not there was a failure to require an EIA or to consider material considerations.

There is no power by which Cabinet can lawfully grant Outline Development Permission for a "rezoning" of land.

68. The applicants have canvassed most ardently, that the Physical Planning Ordinance (PPO), makes no room for rezoning, so that Cabinet acted unlawfully and in excess of its jurisdiction when it made the decision that was communicated per the Action Point of 6th November 2019, granting ODP for a rezoning of land. They further argue that the Board which acted upon that advice did so wrongly.

69. I will say straightaway that the said argument is misconceived, as it is based on two false premises: that the application that found its way to the Cabinet, was an application for rezoning of land, and secondly, that the Governor has no power under the PPO to grant a rezoning of land.

70. Although the facts of this case have been set out at length before now, I must, in my consideration of this ground of complaint once again rehearse the journey of the application until its grant.

71. I will also, along the way discuss as sub-issues, the legality or otherwise of the decisions that led to the application being sent to the Cabinet, as well as the decision of Cabinet which is impugned.

72. The evidence is that the Interested Party started its application for the ODP, which is the first in a two-step permission for development and which represents "an approval in principle to the proposed development" *see:* ***S. 41 of the PPO***, on the 18th of December 2018 when it filled out the DOP Form 1 and completed it on 18th January 2019 with the submission of Forms DOP1 and 2, plans and other documentation for the project

73. It is to be noted that in the letters seeking consultation with relevant institutions: DECR, DDME, and the Chief Fire Officer, the application was described as: *"PR Application 13997 Full Service Hotel With Eighty-Seven (87) Bedrooms, Six stories Plus Basement Including Swimming Pools, Reception, Restaurant, Bar, Gym And Kids Center, Spa And Villas."*.
There was no mention of rezoning in that description.

74. The use of the word "rezoning" as descriptive of the application, commenced when the expression: *"change of zoning from (R4) Medium Density (3-6 units per acre) to (TO1) Tourism Related Development"*, was dictated to the Interested Party's attorney: Gordon Kerr as the wording to be used on advertisement that was required of the Interested Party due to the nature of the proposed development: the construction of an eighty-seven bedroom hotel with ancillary services on Parcel 60801/76, zoned for medium density residential purposes (R4).

75. The consideration underpinning the said dictation to describe the application as one for rezoning or change of zoning, was contained in the affidavit of the first respondent: that the intent of this wording of the advertisement, was to ensure that the public would be apprised of the

essence of the proposed development: in that it would require a change of land use classification (zoning) for that parcel of land 60801/76.

76. Perhaps prudence dictated the use of the said description, or perhaps it did not, as it left the seemingly erroneous impression that the Board had been called upon to grant an application for change of zoning (or rezoning) rather than an ODP for the construction of an eighty-seven bedroom hotel with ancillary services on Parcel 60801/76, zoned for medium density residential purposes (R4).

77. Yet ill-advised though requiring the said description may have been, it was not unlawful for the officials of the Department of Planning, headed by the first respondent to have done so, as it was in conformity with an exercise of discretion based on a duty set out in S. 42 (2) (a) of the PPO thus:

42(2): "The Director by written notice served on an applicant for a grant of a development permission may require the applicant to do either or both of the following, namely-

a. Publish details of his application at such time or times and in such place or places and in such manner as may be specified in such notice.

b. Give details of his application to such persons or authorities as may be specified in such notice

if the Director is of the view that the application will, or, is likely to derogate from the amenities of the public or of adjoining, adjacent or nearby properties".

78. In its journey to Cabinet, the application for ODP which was first presented to the first respondent, went through the Board and then to the Governor in Cabinet. Thus, in attacking the decision of Cabinet as *ultra vires* its powers, other decisions have been challenged.

As aforesaid, these decisions will be the subject of discussion as sub-issues under this head of argument:

PERTINENT DECISIONS

79. One of the decisions in respect of which a declaration is sought (as an alternative to seeking an order of certiorari to remove same to this court for the purpose of it being quashed), is the decision of the first respondent to accept the Interested Party's application [for change of zoning].

80. The applicants' contention in this regard, is that the first respondent had no power under the PPO to accept an application for rezoning, or to refer such application to the Board for its consideration.

81. But as I have found and held, the Interested Party's application had never been one for rezoning or change of zoning. It was an application for an outline development permission (ODP); an application that it was entitled to make in accordance with ***S. 41(a) of the PPO***, and the first respondent, was empowered to receive.

That the application was inconsistent with the use of the land was not reason to refuse it, for there was a recognition in ***S. 39 of the PPO*** that such applications may be presented to the Board.

82. There was thus no lawful or justifiable reason for the first respondent to refuse to carry out his duty under ***s. 42 of the PPO***, of accepting and placing such an application before the Board (the third respondent).

83. The decision of the first respondent to accept the application of the Interested Party for processing, and his decision to place same before the Board were therefore decisions made within the remit of his jurisdiction, and therefore lawful.

84. Another decision of the first respondent and his Planning Department which is under challenge is their decision, having accepted the application for ODP, to treat it as one for rezoning.

85. Was it wrong for the officials to treat the instant application as one for rezoning as is being urged on the court? I think not.

86. That the application was treated from the beginning by the first respondent and his officials as one requiring re-zoning cannot be gainsaid. It was reflected in the advertisement that officials of the Planning Department supervised. Although the first respondent is now insisting that the use of the word "rezoning" was only a loose reference in the advertisement aimed at informing laymen that the proposed development was outside the approved plan, a change of zoning was what the first respondent meant at all material times.

87. That was also what he stated in the Planning Considerations he submitted as a document for the consideration of the Board. It was also what Ms. Tshora Hyman wrote to the Interested Party, when she informed it of the need to advertise the application extensively; it was what was placed in the advertisements. Mr. Redmond who gave evidence for the Interested Party regarding planning practice in TCI he was familiar with stated that traditionally that is how it has been handled.

88. I daresay that the first respondent and the Department of Planning Officials were not wrong in recognising that an application for an ODP that was inconsistent with present land use would necessarily require rezoning of that parcel of land. That is after all, the essence of what the provisions of S. 39 (2) and (3) are intended to achieve in the proper case, being: a change of use of land inconsistent with its present zoning in the land use zoning

plans, which (per the Development Manual 1.3), form part of the Development Plan.

89. I therefore do not see how the officials could have or should have treated the application otherwise, for recognising its implication and communicating its essence, was the justification for requesting for advertisement of the application of Interested Party, and by it, securing the necessary informed participation of members of the public who would be impacted by it, and in the end, to properly advise the Board, (inclined to grant the application), of the limitations on its power by reason of the type of development proposed on the land earmarked for it; to move the Board towards compliance with the S. 32(9) procedure.

90. Should they have described the application as one for a change of zoning and communicated such to the public, and to the Board? I think not. In my view, treating the application as one requiring rezoning of that parcel of land in order to secure informed participation, ought not to have resulted in actually describing the application as one for rezoning. S. 39(2) used the words "inconsistent with a plan which has been approved", and that is what should have been communicated. Doing otherwise is what has created an unfortunate impression (to the public to whom notice was being given), that the aim of the application was to achieve a rezoning in its technical meaning (and as provided for in the Development Manual), when in fact the aim of the application was simply to secure an ODP for construction of a hotel on land zoned as Medium Density: an application inconsistent with the approved plan, a situation recognised under S. 39(2) and (3) of the PPO.

91. In their bid to describe the essence of what such an application would entail by the use of the word "rezoning", "for transparency", the first respondent

(and his team) who had the statutory duty to advise the Board on the application, lost sight of the fact that the Development Manual's reference to land use zoning plans had given the use of the word "zoning" a technical meaning which could not be used loosely and merely as a descriptive word.

92. Thus, the unwise description: "Application for Change of Zoning…" was contained in the S. 47(2) advice to the Board.

The report of the Board, acting on the S. 47(2) advice of the Planning Department, through the Minister to Cabinet, described the application as one in the same wording: "Application for Change of Zoning", and sought approval for it.

The Minister, presented the application with that description to the Governor in Cabinet.

This resulted in the Action Note of 6th November 2019 in the same wording.

<u>DID THE BOARD ACT ULTRA VIRES IN THE APPLICATION FORWARDED TO CABINET?</u>

93. The situation aforesaid, is what the applicants take issue with.

Did the Board act without, or in excess of its jurisdiction when in purporting to comply with the provisions of S. 39(2), it sent to the Minister for transmission to the Board, the application described as one for a change of zoning? I think not.

94. Although S. 39(5) purports to oust the jurisdiction of this court to inquire into the due performance of the S, 39 procedure (and learned counsel for the Interested Party urges the court to uphold the ouster), because non-compliance with S. 39(2) would mean that the Board's decision was *ultra vires* (as it would be an exercise in excess of its jurisdiction), it is important to inquire into whether the Board carried out its duty properly

and within jurisdiction, see: ***Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147 at p. 182, H.L***.

95. While I have held that the words: "Change of Zoning" was unfortunate, being a misdescription of an "application for development permission inconsistent with the plan", it did not, in my view, detract from what it was: an application for an ODP that was inconsistent with the approved plan for which the S.39(2) was available. This provision was resorted to by the Board.

The Board's act was thus not *ultra vires* its powers.

DID THE GOVERNOR IN CABINET ACT ULTRA VIRES HIS POWERS?

EEFECT OF S. 39(2) OF PPO

96. The said provision in S. 39(2) vested power in the Governor in Cabinet to approve the alteration of the present zoning or use of the land in question. That was what was done by Cabinet and conveyed by the Action Point of 6th November 2019.

97. Learned counsel for the applicants maintains that under S. 39(2), Cabinet could authorise a development which was inconsistent with the present zoning, but not a change in the zoning of that land. He contends that to effect a change in zoning, the Governor in Cabinet would have to effect an amendment to the Development Plan of which the Zoning Plan is part. I find no merit in the splitting of hairs to create phantom situations.

98. S. 39(2) reads: *"The Board shall if it appears to it that to grant an application for development permission would be inconsistent with a plan which has been approved by the Governor, but nevertheless considers that such permission should be granted-*

a. refer the application to the Minister who shall pass the application to the Governor for his consideration; and

b. defer a decision on the application until the advice of the Governor has been received in relation to that application; and

c. not grant development permission in relation to the application unless the Governor has advised it that development permission should be granted thereon."

99. It is manifest that the import and indeed, the intendment of S. 39(2) is to vest the power to change the use (or zoning of a particular parcel of land to one with a different zoning) in the Governor alone. What was required of the Governor (In Cabinet) to whom the instant application had been referred under S. 39(2), was his approval that the present zoning of Parcel 60801/76, be changed from (R4) Residential Medium Density (3-6 units per acre), to (TO1), to accommodate the construction of the eighty-seven bed hotel with ancillary services, a tourist venture.

100. Thus, the decision, and indeed the act of Cabinet (Governor in Cabinet), to so approve the change of zoning of Parcel 6080/76 was in accordance with S. 39(2) of the PPO. It was within the law, as the jurisdiction to do so, was properly vested in the Governor in Cabinet.

101. Nor did Cabinet exceed its authority by "grant[ing] Outline Development Permission for a "rezoning" of land" as canvassed by the applicants.

Cabinet indeed had no jurisdiction to grant the ODP and did not. What it did do, and which was within jurisdiction per S. 39(2), was to approve for Parcel 60801/76, a change of zoning from (R4) Medium Density (3-6 units per acre) to (TO1) Tourism related Development, to permit the said development thereat.

102. There has been an argument that the Governor acted under S. 55 of the PPO rather than S. 39(2) of the PPO.

S. 55 reads: *"55. (1) The Governor may direct the Board to refer to him (or to the Minister)—*

(a) all applications for development permission in relation to a particular type or class of development;

(b) all applications for development permission in relation to any locality in the Islands designated by the Governor;

(c) all applications for development permission in relation to a particular type or class of development in a locality in the Islands, designated by the Governor;

(d) any other application for development permission. (Amended by Ord. 9 of 2008)

(2) The Board shall—

(a) refer to the Governor or the Minister (as applicable) for his decision any application for development permission to which a direction made under subsection (1) relates;

(b) refer to the Governor for his decision any application for development permission to which section 4 of the National Parks Ordinance relates."

103. S. 55 is quite different from S. 39(2). It is important to note that by S. 39(2) provision is made: following laid-down procedure, for a departure from the approved plan which, is in essence, a provision for rezoning of a particular land for a particular development, S. 55 vests no such power in the Board or the Governor. It relates to the situation in which the Governor directs that an application for certain types of development be referred to him directly by the Board. It does not provide for a departure from the development plan.

Thus if the Board had referred the application directly to the Governor in Cabinet, there would have been no room for the "rezoning" that Cabinet approved.

104. That is not the case here however. I note that although the referral was misdescribed as having been done under S. 55 of the PPO, the procedure used was the S. 39(2) procedure. I will therefore, in my pursuit of substantial justice, in favour of technical justice, hold that there was due compliance with the S. 39(2) procedure for the Governor in Cabinet to exercise his powers to approve the rezoning of Parcel 60801/76 in order that the Board might be empowered proceed with its decision to make a conditional grant of the application.

The Governor in Cabinet's decision was thus not *ultra vires* his powers.

FAILURE TO COMPLY WITH PART V OF THE PPO

105. Learned QC Mr Katan, has canvassed, quite strongly but wrongly, that the procedure under *Part V of the PPO* ought to have been followed in the grant (or refusal) of the instant application. In particular, he urges the court to find that there should have been public engagement as provided for in Part V of the PPO. He asserts that the alleged non-compliance has led to a flawed decision.

106. The PPO provides in *Ss31-36 of Part V* thereof, for the making of a Development Plan. The said sections deal extensively with the scope of a development plan, arrangements for its preparation, the consideration of proposals which includes publicity for public engagement, its approval and the deposit of the concluded plan.

S. 37 (1-3) deals with how a revocation or modification may be brought into force by the Minister, or Director acting by the Minister.

S. 37(3) imposes a restriction, that a revocation or modification shall be carried out applying with necessary modification, the steps of preparation, consideration and approval set out in SS 31-36 of the PPO Part V, and S. 37(4) vests the Governor with the power of revocation or modification.

Thus where the revocation or modification of the development plan is intended, it must be carried out in accordance with that Ss 31-36 procedure.

107. The S. 39(2) procedure does not, however, admit of such an interpretation or application. It is manifest in that provision, that the Governor in Cabinet's power to approve an inconsistent development by so advising the Board, is vested in the Governor in Cabinet. As the sections 31-36 were never meant to be applicable to the S. 39(2) procedure, the Governor could not be faulted for not complying with it, if he did not. But that is not the case here.

108. Part V of the PPO which is being held up as the standard, runs from S. 31 to S. 39. Thus, contrary to the applicants' argument, the procedure under S. 39(2) (which was complied with), is in fact compliance with the said Part V.

109. Nor, was the Governor in Cabinet in breach of his S. 26 general duty to ensure consistency and coherence in land development in performing his duty under S. 39(2), as learned counsel contends. Plainly, such an interpretation would defeat the intendment of S. 39(2) and (3), placed in the legislation to permit in a proper case, a departure from an approved plan.

110. But it must be placed on record, that what is urged on this court: that the ODP was granted without public engagement, is not accurate, for there is

ample evidence of public engagement from the time of the application until the Board arrived at a decision necessitating a S. 39(2) course of action.

111. I point to the extensive advertisements on the land by notice affixed boldly, in several notices in newspapers, in Gazette notices. By these, notice of the application (and even its implication) was given to the public.

112. I note that following the extensive advertisements, the views of members of the public who gave any sort of response (persons impacted by the notice), were also accepted, collated, and included in the S. 47(2) advice by the first respondent to the Board. In addition, at the Board's 25th July 2019 meeting, the objectors who had made written representations and who chose to be present, were given an oral hearing.

113. In my judgment, public engagement can, and does take different forms; including, but not limited to town hall style engagements. The opportunity that was given for interested persons to present their objections in writing and to be heard orally was in my judgment, adequate public engagement for the purpose if such was required, and I am not persuaded that there was such statutory requirement in respect of the instant application for ODP.

FAILURE TO GIVE ADEQUATE REASONS/FAILURE TO COMPLY WITH THE DUTY OF CANDOUR.

114. The applicants assert that the respondents were expected to provide reasons for their action but did not. Indeed, Mr. Daniel LeVin accuses, that not only were his issues/complaints disregarded, but that no reasons for so doing have been given. It is submitted on their behalf, that the said alleged conduct of the respondents, has also tainted the actions of the Cabinet and the Board regarding the grant of the ODP, with illegality.

115. The applicants also assert that the respondents breached a duty of candour, requisite in dealings by a public authority. They provide examples of this

breach by listing the following: that the respondents provided important documentation very late and caused the applicants to proceed under a misapprehension as to the date of Grant of ODP: 21st November 2019 instead of the 8th November 2019 date supplied at the eleventh hour in the first respondent's third affidavit which was served at approximately 5.30pm on Monday the 20th of July 2020.

116. Once again, I find no merit in the applicants' assertions or arguments: Regarding the alleged duty to provide reasons, there is no denying that there is no statutory requirement to give reasons to the public regarding the grant of an ODP.

Under ***S. 42 (3) of the PPO***, the Director of Planning is required to give notice to a successful applicant for the grant development permission, and to provide reasons where the grant is given subject to conditions. He has this duty also where an application has been refused, to communicate in brief, the reasons for refusal, see: ***S. 42(3)(b) of the PPO***.

117. ***S. 39(2) and (3) of the PPO***, which vests power in the Governor (in Cabinet) to approve development which is inconsistent with approved use by advising the Board, or the Minister (as the case may be), to grant such development permission, does not specify that reasons must accompany his decision.

118. Granted that there exists the constitutional duty for the Government and its privies in their administrative action, to give decisions and do acts that are lawful, rational, proportional and procedurally fair. However, the duty to give reasons therefor, is conditional upon a request being made for such, see: *S. 19(2) of the Constitution: "(2) Every person whose interests have been adversely affected by such a decision or act has <u>the right to request</u> and be given written reasons for that decision or act." (emphasis supplied)*

There is no evidence that such a request was made to the Board, or the Governor, and denied or refused.

119. Yet even without such a request, the respondents have informed the court that Cabinet has waived its privilege in this circumstance, to make available, the documents that were placed before it. Furthermore, learned counsel for the respondents has averred that every document requested for by the applicants was provided in spite of privilege, because the respondents were anxious to set the picture straight and to demonstrate transparency.

120. In my judgment, in the absence of a statutory requirement for the provision of reasons, the applicants cannot hold themselves entitled to them, nor can they make the lack of such, a ground of complaint in the instant application. Learned counsel for the applicants graciously owned to his error and withdrew the case he cited for the court's consideration in this regard. It is my view, that without the statutory imposition of a duty to give reasons, no duty was breached, and that the respondents' posture must be commended rather than censured.

121. In response to the charge of lack of candour, learned counsel for the respondents explains that the lateness in supplying the requisite information, was due to the lockdown imposed by the COVID-19 pandemic, during which it was difficult to go to the office to access files. She asserts that what documents were accessed, was secured in exigent circumstances, which accounts for the mistake made as to the date of the meeting. The mistake she says, was corrected as soon as documents could be accessed, and the correct date ascertained.

122. COVID-19 and its overturn of all things familiar is something of which I take judicial notice. It is therefore difficult to discountenance the explanation presented by the respondents in this regard.

123. I must therefore hold that there has not been sufficient demonstration that the duty of candour has been breached by the respondents.

Breach of the duty to secure consistency;

Failure to act in accordance with the development plan

124. The applicants contend, that in granting the instant application, there was a breach of duty to secure consistency. They cite an infringement of S. 3 of the PPO. S. 3 of the PPO requires the Minister to secure consistency and continuity in the framing of a comprehensive development with respect to the use and development of land in the Islands, S. 26 imposes a similar duty on the planning officers, the Director of Planning, Board, Minister and Governor to promote development which is consistent with a coherent policy for the development of land in the Islands, including adherence to a development plan.

125. The argument that the Governor in Cabinet or the Board breached such a duty, would not be tenable, for as I have held, the S. 39(2) procedure was placed in the PPO to permit a departure from the approved plan in the proper case (the application being handled with the safeguards contained in the said S. 39(2) regarding the various levels of engagement (the Board, the Minister, and the Governor in Cabinet), where the departure would not involve the modification of the entire plan or revocation thereof, but would permit development otherwise inconsistent with the approved development plan.

Adherence to this laid down procedure provided in S. 39(2), could not be a breach of duty on the part of the Board, or the Governor in Cabinet to secure consistency.

Legitimate Expectation

126. The applicants urge the court to hold that they are entitled to have their legitimate expectation to live in a residential area, protected. Learned counsel Mr. Katan QC, argues that such legitimate expectation created by the zoning of the area for residential use, should not be taken away without consultation. He argues that the advertisements did not suffice for the required consultation.

127. I have already held that generally, in the consideration of an ODP application which is inconsistent with the Development Plan, there is no statutory duty to engage the public, that is to consult the public. However, that was not to say that in the instant matter, none was required, or that none was done.

128. The law on consultation (when there is no statutory duty to consult on a particular procedure), is well summed up in ***R (on the application of Moseley) v London Borough of Haringey [2014] UKSC 56 at pp 35***: where Lord Reed stated, that there was *"no general common law duty to consult persons who may be affected by a measure before it is adopted. The reasons for the absence of such a duty were explained by Sedley LJ in R (BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWCA Civ 1139; [2008] ACD 20, paras 43-47. A duty of consultation will however exist in circumstances where there is a legitimate expectation of such consultation, usually arising from an interest which is held to be sufficient to found such an expectation, or from some promise or practice of consultation. The general approach of the*

common law is illustrated by the cases of R v Devon County Council, Ex p Baker [1995] 1 All ER 73 and R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213."

129. In the 'Planning Department Considerations' incorporated into the paper presented by the Minister to Cabinet, the use of the land in the area was described in the following paragraphs:

"2.The zoning of the subject parcel is (R4)Medium Density Residential (3-6 units per acre).

3.Although the area is zoned for residential development [it] is not a residential area at this time.

4.There is a gas station in the area and the land located behind the gas station is also considered for commercial development.

5.There has not been any recent planning application for the construction of residential buildings for the subject area, only for a subdivision".

130. At the hearing of the instant application, this court was treated to a visual presentation of the Providenciales Physical Development Plan, with emphasis on the developments so far in Providenciales, particularly in the area called the Bight. It was demonstrated that the area for the proposed development was in fact, a street away from two hotels, one of which is the third applicant. These matters were apparently presented to the court, for the purpose of negating the applicant's assertion that they had a legitimate expectation that the area would continue to be a residential one.

131. But it seems to me that while commercial enterprise close to an area zoned for residential purposes may be suggestive of anything but an intention to keep that area exclusively residential, it is doubtful that the existence of two hotel developments a street away from the area of the proposed

development, will necessarily negate a legitimate expectation in the residents and land-owners, that it would continue to be residential.

132. Having said this, I must say that the doctrine of legitimate expectation, which is founded on the duty of fairness, does not say that such legitimate expectation must by all means be protected by the maintenance of the status quo. What it does say, is that the public body that has made assurances of the state of a thing, will normally be required to comply with that assurance persons have come to rely on, unless there is a good reason to depart from it: *"A…reason for the protection of legitimate expectations lies in the trust that has been reposed by the citizen in what he has been told or led to believe by the official"* Wade & Forsyth Administrative Law 11th ED. 451.

133. That the Development Plan (inclusive of the Development Manual which makes reference to Land Use Zoning Plans) gives an assurance that a certain zoning means what is stated in the Zoning Plan, cannot be gainsaid. That circumstance is what has given rise to an expectation which is legitimate for the first and second applicants, that the area zoned as (R4) Medium Density (3-6 units per acre), will remain residential. Such could not be said of the third applicant which is itself a hotel, carrying out tourist related commercial activity. Thus for the first and second applicants, it does not matter that across the road, commercial enterprise is taking place. As long as that zoning remains, there exists legitimate expectation in land owners and users. This is what places a duty of consultation, even where statute is silent on it, on the public authority.

134. Mr. Katan QC insists that in the present instance, there was no consultation, as only advertisements were made. In this, I differ with him. I am guided by the guiding criteria for proper consultation in ***Regina v***

Brent London Borough Council ex parte Gunning [1985] 84 LGR 168, approved by the Supreme Court of the United Kingdom *in R (on the application of Moseley) v London Borough of Haringey* (supra): consultation must be at a time when proposals are still at a formative stage; the [public authority] must give sufficient reasons for any proposal to permit of intelligent consideration and response; adequate time must be given for consideration and response, and the product of consultation must be conscientiously taken into account. In Mosely's case it was held that common law requirements of procedural fairness will inform the manner in which the consultation should be conducted. In that case, it meant consultation on conceivable solutions (available options).

135. But I am also guided by the nuanced approach to such requirements contained in ***R. (on the application of Robson) v Salford City Council [2015] EWCA Civ 6*** where it was held that, in spite of an incomplete picture provided by the consultation material produced by the public there was no public law error of conveying a misleading impression that other options were irrelevant, as had happened in Moseley. Accordingly, there had not been a failure to consult fairly. Thus the question of what fair consultation is, is determinable on a case by case basis.

136. In the Turks and Caicos Islands, while the PPO does not impose a duty to consult in the consideration of an ODP inconsistent with the approved plan, it does provide that in certain circumstances and for certain purposes, the Director may require an applicant for a development permission to publish the application in the manner to be advised see: ***S. 42(2)(a) of the PPO***. It seems to me that the purpose of this is to inform the public of the application and its implications for persons who might be affected by it and elicit responses which would bring forth the views of the public on

the proposed development. That is the mode of consultation envisaged in such a circumstance.

137. In the instant matter, on the showing of the first respondent, the decision to demand that the Interested Party advertise the application, with the wording that was dictated by the Planning Officials, was aimed at achieving the said purpose. The purpose was achieved, for the advertisements that ran for twenty-eight days on different media, as well as on a notice prominently displayed at site, and which went so far as to use the expression "rezoning" to give the public a fair idea of what a grant of the ODP might eventually entail, did elicit responses from persons who considered that they would be impacted or prejudiced by the grant of the application for ODP for the proposed development.

138. The applicants herein, as well as the Delancys (who later withdrew their objections), presented their views most forcefully, and I daresay, comprehensively. The LeVins wrote more than a few times (both Mr Eric LeVin, and Mr. Daniel LeVin wrote copiously), and made their objections most clear. Mr. Chuck Hesse also wrote comprehensively and provided an Executive Summary for easy appreciation.

139. Beyond this, all the applicants availed themselves of the opportunity to inspect the papers on the application, at the office of the Department of Planning. Two of the applicants who having made written representations, also presented themselves at the Board's meeting, were given the opportunity to make oral representations. The S. 47(2) report which placed before the Board and informed the paper presented by the Board through the Minister to the Governor in Cabinet, also contained all the complaints and concerns of these persons.

140. In considering the application, Cabinet further posed its own questions regarding the complaints and received answers from the first respondent. Thus, the persons who would be impacted by the proposed development and who could have had the legitimate expectation that the area would remain residential had their views considered.

141. No doubt, the trend regarding consultation since *Mosely's case*, is for some communication to be made by the public authority regarding why input supplied by the public is rejected, or a choice is made for one option over another, but it must be borne in mind that unlike the decisions cited as persuasive authority in this court, the S. 39(2) procedure which is triggered by the nature of an inconsistent application, is a prerogative vested in the Governor in Cabinet. No duty of providing reasons is provided for its exercise, and none of the applicants exercised their constitutionally-guaranteed right to request for such reasons.

142. In my judgment, as consideration was given to the complaints and concerns in the at every stage of the decision-making process, the demands of fairness underpinning the doctrine of legitimate expectation were addressed, despite the lack of communication to the applicants of the reasons for the approval for rezoning of Parcel 6080/76.

Failure to require and consider an EIA

143. There is no controversy (and the parties are on common ground), that the conduct of an EIA was essential in the Interested Party's application. The difference in opinion, is the applicants' contention that it should have been conducted before the grant of the ODP, not after. The respondents refute this, submitting that the important thing is to require the EIA to be conducted before the approval of the Detailed Development plan which is

the second stage in the approval process of the development permission, see: 41 (a) and (b) of the PPO.

144. In the submission of learned counsel for the applicants, the lack of an EIA before the grant of an ODP not only taints the whole process with impropriety, but must be held to be fatal to the decision to grant the ODP.

145. In his submission, there being no controversy over the fact that it is mandatory to require an EIA with respect to this application, the relevant issue is when it should be obtained. Regarding the timing, he argues that an EIA must be provided prior to the grant of an ODP in order to inform the decision with respect to the environmental impact on the development. In this regard, he contends, that as the grant of an ODP is in principle an approval of the proposed development, the Department of Planning would not be permitted to resile from the ODP regardless of the findings of any EIA.

146. Thus, he contends that it is irrational not to require one prior to the grant of ODP and by it to secure the input an EIA gives and the public consultation attendant to it, especially in an application which is inconsistent with the approved plan. Learned counsel cites for the guidance of this court, the dictum of Lord Hope ***in R (Barker) v Bromley London Borough Council and Commission of the European Communities v UK [2006] QB 764***:

"An application for outline planning permission should be accompanied by sufficient information to enable that question to be answered and an EIA, if needed, to be obtained and considered before outline development permission is granted..."

147. The respondents explain that traditionally, due to the expense of conducting an EIA, and having regard to the requisite input of various

institutions in the terms of reference for an EIA, the EIA is required after the grant of the ODP which may be granted with conditions attached to be addressed in the EIA.

Consideration of Arguments on EIA

148. In S. 45(1)(b) it is provided as follows:

"If so required by the Director by written notice, an applicant for development permission shall -

(b) at his own expense, cause an environmental impact or economic feasibility study to be made of the proposed development by a suitably experienced person approved by the Director".

It is important to note that the use of the word "If" in the said provision of the PPO, connotes a discretion in the Director of Planning to require an Environmental Impact Assessment (EIA).

149. The evidence before this court is that in the performance of the Director of Planning's duty in respect of the application, relevant Government Departments were consulted on the application. One of the institutions: DECR, advised that a Comprehensive Impact Assessment (CIA) to be conducted by 'qualified, experienced, and independent professionals', with the Terms of Reference for the project, drafted by DECR and other Government departments and units, and that all policies on CIA/EIA/EIS must apply.

150. The first respondent (the Director of Planning) who did not require an EIA to be carried out by the Interested Party, included the DECR recommendation of a CIA in his advice to the Board, together with sixty-two suggested conditions embracing the CIA.

151. The Board also, in its decision to grant approval for the change in zoning for Parcel 6080/76, attached sixty-four conditions to it, five of which were

dedicated to the conduct of a Comprehensive Impact Assessment (CIA). I reproduce the said paragraphs:

"5. The type of development and the location requires a Comprehensive Impact Assessment (CIA) to be conducted by qualified, experience [sic] and independent professionals.

6. The Terms of Reference for this project shall be drafted by DECR in cooperation with the Department of Planning and other concerned TCIG departments and units. All policies on CIA/EIA/EIS shall apply

7. The CIA shall address any change that the proposed project may cause in the environment, including any change it may cause to the flora and fauna, any effect to human health in the affected areas (if any) and socio-economic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes, or any structure, site or thing that is of historical, archaeological or architectural significance or effect that may occur within or outside of the TCI.

8. A geotechnical study (part of the CIA) must be conducted to ensure that the area is capable to carry the load of the building.

9. All potential sources of environmental problems that will be identified in the CIA must be mitigated and/or mitigation plan (with sufficient funding) during construction and operation must be prepared".

152. The first respondent alleged that typically, the practice for requiring the EIA after the ODP but before the DDP, is informed by considerations such as the judicial pronouncement by the Court of Appeal which was said to not restrict its timing, and more particularly, by long-established (thirty years) prudent planning considerations. In this regard, he made the following assertion: *"…the decision to grant ODP is subject to numerous conditions including a detailed environmental assessment. It has never*

been the policy in over 30 years to put any applicant to the substantial expense of an environmental assessment prior to the grant of ODP. Such a requirement would be unworkable as it would require the Department of Planning to issue Terms of Reference without the input of key decision makers and other departments and in my experience as a planning official would be unworkable".

153. While I must point out that the Court of Appeal before which the issue of an EIA had been raised did not, to my mind, make any definitive pronouncement on when it should be issued, it is my view that the matters adverted to as underpinning the exercise of his discretion in the "when" of the EIA, represent two very weighty matters that were taken into consideration, being, premature expense, and the premature issuance of terms of reference without the requisite input of stakeholder departments. His assertion also, that the lack of stakeholder input in an early EIA would be unworkable, could not be denigrated by this court without any evidence to the contrary.

154. There is no controversy regarding the import of the grant of an ODP as an approval in principle for a proposed development, see: ***S. 41(a) of PPO; also, 2.7.1 of the Development Manual.*** It is also to be noted that ***para 2.7.2 of the Development Manual*** provides that an EIA may be required in the consideration of the grant of an ODP.

155. As aforesaid, the discretion to require an EIA is vested in the Director of Planning. Furthermore, sight must not be lost of the nature of an ODP as the first of a two-step process to granting development permission; and where it is conditional, informs the applicant that certain requirements must be met before the application may progress to the next stage in development permission.

156. I do not hold the view contained in cases cited as persuasive authority, that the ODP is so binding, that the Board would not be permitted to resile from it. This is because ***S. 50(1) of the PPO*** provides that an ODP will lapse and cease to have effect if no Detailed Development Plan (DDP) is applied for within a year of the grant.

157. Where it is conditional as in the instant case, no progress can be made to the next step (DDP). The instant ODP was granted subject to sixty-four conditions including a Comprehensive Impact Assessment (CIA), to be complied with before the next stage. Further evidence shows that on 19th December 2019, the Director of DECR who had insisted on the conduct of a CIA, produced the terms of Reference for the EIA, without any notation that it was belated.

158. In the circumstance, it seems to me that the complaint of the applicants is not well-founded, for the discretion of the Director to not require an EIA before the ODP, appears to have been properly exercised on tested planning considerations.

159. Having considered all these matters, I do not find any wrongdoing, impropriety, or even lack of prudence in, or about, the lack of an EIA before the grant of the ODP, especially as the grant was conditional upon a number of things including the conduct of a CIA with EIS and EIA conditions applying. I go ahead to hold that the Board which was advised by the Director, was not led astray when it granted the ODP without requiring an EIA beforehand.

THE DECISION OF 8TH NOVEMBER 2019

160. At the hearing of the application, the applicants belatedly sought to introduce an amendment. That amendment was disallowed for tardiness. The applicants however, had in anticipation of the grant of the

amendment, produced skeleton arguments. When the amendment was refused, learned counsel Mr. Katan QC urged the court to disregard all the references to matters introduced in argument in anticipation of the doomed process. One of the matters sought to be introduced was an argument regarding the date of the grant: 8th of November 2019, instead of what it was initially thought to be: 21st of November 2019.

161. Because the amendment was disallowed, even though Mr. Katan QC made references to the said dates and what he alleged to be the illegally contained in there, no arguments were heard from the respondents or the Interested Party. Since no issue was joined on the matter of the dates, this judgment will not take into consideration any of the matters introduced in that regard by learned counsel Mr Katan QC.

162. Of the grant of the ODP on 8th of November 2019, the applicants have set out four grounds of complaint, two of which have already been dealt with: EIA and the breach of the duty to ensure consistency.

IRRATIONALITY

163. The applicants allege that the decision of the Board to grant the ODP upon the approval of the Governor-in Cabinet was irrational.

In ***Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374)***, Diplock LJ described an irrational decision as an unlawful one; the measure of such, being that it was *"so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."* Before his seminal pronouncement, the standard referred to commonly as Wednesbury unreasonableness, was enunciated in ***Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223***.

164. The importance of this principle is that while in a judicial review application, the court's duty is limited to the manner in which the impugned decision was arrived at or made to determine its lawfulness and not its substance, when the decision is alleged to be irrational, the court is empowered to examine the merits of the decision to determine its rationality or reasonableness.

165. I have already held that neither the Board nor the Governor in Cabinet may be said to have acted in excess of jurisdiction; their decisions, were lawfully taken within their respective jurisdictions.

166. But should the decisions have been taken?

Was the Board's decision to seek a rezoning of Parcel 60801/76 by referring same to the Governor, a rational exercise of its power? I should say it was.

167. As aforesaid, the consideration of the application for ODP which was found to be inconsistent with the land proposed to be used for the development, underwent the S. 39(2) procedure which was the only lawful thing to do after the Board came to the decision that the ODP be granted subject to conditions.

168. Was Cabinet's communicated decision to grant the application to rezone Parcel 6080/76 a rational exercise of its power? I am persuaded it was.

169. The Cabinet before which the relevant documents were placed providing information on the concerns of the land owners and residents, as well as planning considerations, were fully equipped to consider the application. They went ahead to pose questions of their own and received answers form the first respondent. These questions which they posed in spite of the conditional approval recommended by the Planning Department first, and then the Board, indicated their recognition of the opposing interests of

the Interested Party and the residents, and demonstrated that they gave careful consideration to the implication of the application, before they gave their approval to the rezoning of that parcel of land.

170. Upon receipt of the Cabinet Action Point of 6th November 2019, the Board, which had suspended the making of the grant to abide the Cabinet's decision, went ahead to do what it had decided to do: grant a conditional ODP; and was now empowered to do.

171. In earlier paragraphs I have already discussed that there was no breach of the Board's duty to exercise powers consistently in accordance with S. 26 of the PPO for the S. 39(2) procedure was placed thereat to make room for departure in the appropriate case.

172. I have also discussed why it was not unreasonable not to require an EIA before the grant of the ODP.

173. The applicants also allege that in granting the ODP, the Board misdirected itself as to the meaning and effect of the zoning decision of 6 November and had regard to irrelevant considerations.

174. In my judgment, the applicants were not able to establish that the Board, failed to consider material considerations. The matters material to the instant grant were: the Board was advised by the Director of Planning in a S. 47(2) report which was comprehensive and took into account all objections, concerns and recommendations from stakeholder departments and also supplied technical planning considerations. Further planning considerations which provided answers to concerns raised were also provided by the Planning Department. The Board also had further input from two of the applicants who showed up at the July 25th meeting, and also from the Interested Party. All these were before the Board for their consideration before the decision was made to grant conditional approval.

175. The applicants have complained, and seek relief because they allege that in making the grant, the Board took into consideration the decision of the Cabinet and/or failed to consider properly or at all, the representations of the applicants and other representations and objections made to it in relation to the application.

176. No evidence of this allegation has been placed before the court save the suggestion that because the grant which was opposed was made, consideration was not given to the complaints and concerns or any material considerations. In my judgment, that is not the yardstick for measurement of a decision properly taken. In the absence of any evidence that the matters that required consideration were not given any consideration at all, I am satisfied that all pertinent matters placed before the Board were duly considered before the decision was made to grant conditional ODP.

After the said decision, the s. 39(2) procedure was followed.

Thereafter, upon receipt of the Action Point of 6th November 2019, the Board went ahead to grant the ODP subject to conditions.

177. I cannot find in the Board's decision to grant the ODP which they had arrived at before they sought Cabinet's approval for the change of zoning of that particular land to permit the proposed development, any irrationality or unreasonableness within the meaning of the said words, as defined in the *Council of Civil Service Unions* case, or the celebrated Wednesbury case (supra).

178. I have examined the grounds of complaint, the heads of argument under which the complaints were presented, and the reliefs they seek in this judicial review application, which are:

A declaration that the Director of Planning should have refused the application for rezoning; a declaration that the Cabinet and/or The Governor in Cabinet, did not have jurisdiction to grant outline development permission for the rezoning of parcel 60801/76; a declaration that the Board's decision was irrational; an order of certiorari to quash the decisions of the Director of Planning the Board, Cabinet to approve rezoning, and the Board to grant the ODP or alternatively, to declare the said decisions ultra vires.

179. I have not found any of the grounds made out. In consequence I have not found the applicants entitled to the reliefs sought.

180. Accordingly, the application for judicial review of the said decisions, is dismissed.

181. Costs will be determined upon submissions of counsel.

Sgd.
M.M. AGYEMANG
CHIEF JUSTICE