**IN THE COURT OF APPEAL**
**TURKS AND CAICOS ISLANDS**

**Civil Appeal No CL-AP 10/20**

**In the Matter of an Application for Judicial Review**

**BETWEEN**

**REGINA**

***Ex parte***
**Eric John LeVin**
**Daniel Joseph LeVin and**
**The Proprietors, Strata Plan No. 84**

**Appellants**

**And**

**(1) THE DIRECTOR OF PLANNING**
**(2) THE CABINET OF THE TURKS AND CAICOS ISLANDS**
**(3) THE PHYSICAL PLANNING BOARD**
**(4) HIS EXCELENCY, THE GOVERNOR OF THE TURKS AND CAICOS ISLANDS**

**Respondents**

**and**

**THE YARD LIMITED**

**Interested Party**

| | |
|---|---|
| **Before:** | **The Hon Mr. Justice Humphrey Stollmeyer, President**<br>**The Hon Mr. Justice Neville Adderley, Justice of Appeal**<br>**The Hon Mr. Justice Stanley John, Justice of Appeal** |
| **Appearances:** | **Mr. Jonathan Katan, QC for the Appellants**<br>**Ms. Libby Charlton and with her Dominic Gardiner and Tshora Hyman for the Respondents**<br>**Mr. Conrad Griffiths, QC for the Interested party** |
| **Heard:** | **14, 15 January, 2020** |
| **Delivered:** | **3 May, 2021** |

**JUDGMENT**

**Adderley, JA**.

[1] The appellants own property in Grace Bay, a high-end area of Providenciales in the Turks and Caicos Islands ("TCI"). Their properties are adjacent or near to Parcel 60801/76 measuring 6.83 acres. That parcel is designated as residential under the current National Physical Development Plan 1987-1997 for Providenciales ("NDP") published under the

Physical Planning Ordinance ("PPO"), which designates land use in Providenciales. All of the appellants' properties, except one, are also designed as residential.

[2] The Government approved an application by the Interested Party for the development of a $23 million six-story Full Service Hotel, 87 keys, with infrastructural amenities to be built on parcel 60801/76.

[3] The appellants felt aggrieved by the decision and applied for judicial review.

[4] After hearing the matter, the Learned Chief Justice ("the Chief Justice") dismissed the application.

[5] The appellants disagreeing with the Chief Justice's decision have appealed to this Court.

**The Impugned decisions**

[6] In summary, the appellants identified the impugned decisions as follows:

1) the decision of the Cabinet, the second respondent, reported in an Action Point dated 6 November, 2019 to grant conditional approval of the application for the rezoning of the development land from (R4) medium density residential (3-6 units per acre) to (T01) Tourism related development, in order to construct a full-service hotel;

2) the decision of the Physical Planning Board, the third respondent and/or the Director of Planning (DOP"), the first respondent, to grant Outline Development Permission ("ODP") to the Interested Party, subject to various conditions.

[7] As a result of the decisions the Interested Party was granted Outline Development Permission ("ODP") in respect of parcel 60801/76 to carry out the first phase of a phased development including a full-service Hotel 87 keys, 6 stories plus basement, including Pools, Reception, restaurant, bar, Gym and Kids Centre, Spa and Villas. The construction of the hotel had a projected value of $23 million. ODP is described in s.41(a) of the PPO as approval in principle to the proposed development but not to permit any actual development to take place until a grant of detailed development permission.

**The Proceedings**

[8] Pursuant to leave granted 13 February, 2020 the appellants applied for judicial review of various physical planning decisions made under the Physical Planning Ordinance CAP 9.02 by the second appellants, the third respondent and the fourth respondent (the Governor) in favor of the Interested Party (the Yard Limited).

[9] The appellants applied for declarations that the Cabinet and/or the Governor in Cabinet, does not or did not have jurisdiction to grant Outline Development Permission for rezoning the subject parcel of land, and that the Board's decision to grant ODP was irrational. They sought certain declarations and an order of certiorari in respect of the decisions

**The Parties**

[10] The first and second appellants are beneficiaries under a trust, which is the registered owner of parcels 60714/111 and 112 on which the first appellant has a home, and 113, 119, and 123-139, and 141. All are in close proximity to the proposed development.

[11] The third appellant is the registered owner of parcel 60802/65 being the common property of Wymara Hotel, and is also party to a restrictive agreement in respect of parcel 60812/34, which is across the street from the site of the proposed development.

[12] The issues raised by the decisions were foreshadowed in a letter before action dated 4 December, 2019 from the appellants' attorney to the Attorney General, HE the Governor and other relevant officials on behalf of Eric John Levin, Daniel Joseph Levin and the Proprietors of Strata Plan No. 84 (the Wymara Hotel and Resort) respectively objecting to the change in use of parcel 60801/67 Lower Bight Road essentially on the following grounds:

1) The ODP permission was for "rezoning".
2) The PPO gives a conclusive list of the types of permission that may be granted and rezoning was not one of them, so granting such a permit was outside the power of the Board.
3) The property is zoned a medium Density Residential on the NDP and the change in use would not be consistent with the zoning for parcel 60801/67 under the NDP as required by s.26(1) of the PPO.
4) The Board has a legal duty under s. 39(1)(b) to have regard to NDP and, as far as it is consistent with the objectives set out in s. 26(1), to be guided by the NDP.
5) There were no good reasons to justify a decision that is inconsistent with the NDP and asked for reasons.

6) There was no confirmation that their clients' various objections and concerns were considered and reasons given as to why they were rejected.
7) Some of the conditions attached to the grant were questioned, as well as was whether the Minister's certificate was granted as required by the act in this case.

[13] The appellants seek to set aside the decisions because they claim that the application ought not to have been approved because it is unlawful. They set out their objections in extensive written communication to the DOP available in the RECORD. Among other things, they claim that it is a change in zoning which will lead to the "undesirable and wrong practice of spot zoning", which has the effect of transferring real actual wealth from the nearby residential property owners to the landowners and the developers of the Bight Hotel. In the case of the third appellant it would adversely affect its business by the increase of noise pollution brought about by increased vehicular traffic, inconvenience to road users wishing to access their hotel, and other reasons. Persons with properties next door or near to such developments fear what one objector said could result in "a ribbon creep of commercial property" next door. They surmise that it will probably lead to a decrease in property values due to overcrowding in that part of the Grace Bay Area, and the Grace Bay Beach. It was also inconsistent with the governments "Vision 2040", and other reasons. The development may also be in breach of a restrictive agreement in the area relating to parcel 60802/65.

**The Statutory Regime**

[14] Statutory control of development is set out in Part VI of the PPO. Especially relevant to this case are sections 26, 39, 40, 41, 42, 43, 45, 46 and 47.

[15] Section 40(1) provides that no person shall carry out any development unless, prior to the commencement of such development, approval has been obtained under the Ordinance.

[16] Section 41 sets out the four areas in which permission can be granted namely: ODP, detailed development permission, permission to subdivide land, and permission to display an advertisement.

[17] Submission of development applications and the duty to advertise are provided for in Section 42 set out as follows:

> *"42. (1) An application for the grant of development permission shall be submitted to the Board through the Director, in accordance with the requirements of any regulations made with respect to such applications, and shall be accompanied by the fee prescribed therefor.*

*(2) the Director, by written notice served on an applicant for a grant of development permission, may require the applicant to do either of 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 the 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.*

*(3) the Director shall notify the applicant for development permission, in writing, of the decision on the application, giving-*

*(a) where the application is granted, the conditions (if any) subject to which the permission is granted and the reasons therefor; or*

*(b) where permission is refused, a brief statement of the reasons for such refusal.*

[18] Section 42(4) places a 60-day timetable from receipt of the application for informing the applicant or giving him a time when he is likely to receive a decision.

[19] Section 43 makes provision for expedited applications.

[20] Section 44 provides that the Board can refuse permission unless a Minister's Certificate of Approval is obtained for various applications. It includes where the value of expenditure excluding the land will exceed 1 million dollars. Section 45 gives the Director power to request additional information from applicants.

[21] Consultation may also take place by the Board with any public officer or other persons who appear to him to be likely to provide information relevant to the application (s. 46(1)).

[22] Section 47(1) sets out in a list at (a)–(i) the matters which the Board shall take into account in deciding on an application. Listed as its first criteria in (47(a)): "any development plan applicable to the area where the proposed development would take place".

[23] Section 47(2) provides that advice given to the Board should be in the form of a Report. It states:

*"(2) Advice given to the Board by the Director, under subsection (1) shall be in the form of a report on each application, summarizing any relevant*

*factors recommended to be taken into account in respect of that application and the suggested appropriate decision to be given on the application."*

[24] Under s.47(3) the Board may also take into account any other material matters even though the Director has not advised the Minister or the Board on those matters.

[25] Section 26 of the PPO imposes a duty on the Governor, the Minister and the Board, the Director and all planning officers charged by or under the Ordinance with the exercise of any power or the performance of any duty to exercise that power or to perform that duty in such a way as will promote development of land, which:

*"(a) is consistent with a coherent policy for the development of land in the Islands (Including any development plan having effect in accordance with the Ordinance);*
*(b) promotes orderly development of the Islands in such a way as is beneficial to the people of the Islands; and*
*(c) takes into account environmental, social and economic considerations"*

[26] However, s.39 deals with the case where the proposed development is inconsistent with the NDP and it provides a procedure for considering such a development. It provides as follows:

*"39. (1) When a plan has been approved by the Governor-*

*(a) it shall be the duty of all public officers to have due regard to, and so far as is practicable be guided by, the plan in formulating and preparing any project of public investment and development in the Islands;*

*(b) The Minister and the Board shall, in considering any application for development permission, have regard to, and as far as it appears to be consistent with the objectives set out in section 14(1) [appears to be an intended reference to s. 26] be guided by the plan*

*(2) 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*

> *(3) Where an application for development permission is to be considered by the Minister under this Ordinance, and it appears to him that a grant of such application would be inconsistent with the plan which has been approved by the Governor, but the Minister nevertheless considers that such permission should be granted, he shall refer the application to the Governor and shall thereafter apply subsection 2(b)..."*

[27] Section 39(5) states that no court shall inquire into whether the procedure set out in s.39 has been complied with in relation to any matter. However, we are to keep in mind the well-established principle of public law that statutory powers entrusted to the executive branch of government must be exercised within the four corners of the relevant statutory powers, and when the executive acts outside these boundaries, its decision is ultra vires and unenforceable (per Lord Upjohn in ***Padfield v Minister of Agriculture and Fisheries and Food*** [1968] AC 997 at 1060) cited in ***Silly Creek Estate and Marina Company Ltd v Attorney General of Turks and Caicos Islands*** [2021] UKPC 9 per Sir Keith Lindblom at paragraph 60).

[28] The exercise of the power to approve a development inconsistent with the NDP is circumscribed by the correct procedure having been used. This founds the jurisdiction for the Governor to make such a decision. If the wrong procedure was used it would not engage the Governor's jurisdiction and he would be acting without jurisdiction. The Chief Justice clearly recognized this and pointed out at paragraph 94 that the supervisory power of the court cannot be ousted where there is a question of jurisdiction. She relied on ***Anisminic Ltd v Foreign Compensation Commission*** [1969] 2 AC 147 per Lord Morris of Borth-Y-Gest at p182).

[29] The Chief Justice, therefore, undertook the exercise over several paragraphs of her judgment to review the process whereby the ODP had been granted in order to determine whether or not the procedure was complied with.

**The Application and approval process**

[30] The application was duly made by the Interested Party under s.41(a) of the Physical Planning (Development Permission) Regulations on 18 January, 2019 to the Director of Planning for ODP permission. The application was for the use of the land/and or buildings as a Full-Service Hotel 87 keys, 6 stories plus basement, including Pools, Reception, restaurant, bar, Gym and Kids Centre, Spa and Villas. The construction of a hotel with a projected value of $23 million was to be done in 8 phases and this was an application Phase I of the development.

[31] It was not an application for rezoning.

[32] Pursuant to his powers under s.42(2) the DOP required the applicant to advertise, but after the first set of advertisements evidently realizing that the permission being sought would result in a de facto rezoning of the property insisted that the advertisement to the public be amended to specify that it was an application for rezoning instead of merely making a statement in such advertisement that it was inconsistent with the plan.

[33] As a result of the advertisements he received considerable feedback from the appellants. In fulfillment of his power under s.45 he consulted with the various relevant government departments. The Chief Justice summarized the consultation undertaken by the DOP with the Department of Environmental and Coastal Resources ("DECR"), the Department of Disaster Management and Emergency ("DDME'), the Chief Fire Office, Ministry of Finance, and Invest TCI, and the Ministry of finance. Among other things, the DECR recommended that the application required the conduct of a Comprehensive Impact Assessment("CIA") and that all policies on CIA/EIA//EIS applied. DDME required, among other things, certain provisions against flooding. The various comments were reflected in the conditions attached to the ODP.

[34] Using the information obtained, the DOP compiled the mandatory report under s.47(2).

[35] In the s.47 Report it was revealed that on 23 October the paper was taken to Cabinet. Cabinet raised some pertinent questions including the public response and certain issues about parking. Answers were given to those questions.

[36] The Department of Planning made a number of specific recommendations including, among others, that permission only be given to phase I. The other recommendations were reflected in the conditions attached to the ODM.

[37] Among other things, it was pointed out that the development was inconsistent with the NDP because it would require a rezoning of the lot. Nevertheless, it was recommended. The DOP through the Department of Planning stated that it had no objections to the application and therefore recommended Conditional approval. The Town Planning Board recommended that planning consideration be only given to the proposed hotel development (Phase1-The Bight Hotel) including the support infrastructure (swimming pools, reception, restaurant, bar, gym and kid's centre and spa). The Department also made a number of specific recommendations including some that were reflected in the conditions attached to the ODM.

[38] After considering the Report, asking and being satisfied on various queries arising therefrom and also having had the attendance of two of the appellants at the meeting, the recommendation was taken by the Minister to the Governor in Cabinet who approved the application in Cabinet.

[39] An "Action Point" dated 6 November, 2019 from the Clerk to the Cabinet to the PS Ministry of Infrastructure read as follows:

> "Subject: Consideration of Planning Application PR 13997 (Outline Development Permission)
> Please be advised that Cabinet at its meeting today discussed the above captioned matter which was submitted for round robin consideration and advised that: It granted conditional approval 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 a full service hotel in Parcel 60801/76, the Bight, Providenciales, which was submitted by the Yard Ltd c/o Missick & Stanbrook in accordance with the provisions of Section 55 of the Physical Planning Ordinance 2014."

[40] In the interpretation section of the Ordinance "Governor" means "the Governor in Cabinet" and "Governor in Cabinet and any cognate phrase means the Governor acting with the advice of the Cabinet".

[41] The ODP was issued on 8 November, 2019 in terms of the application, not as a permission for rezoning. In part, it read as follows:

"Turks and Caicos Islands
The Physical Planning Ordinance 1989
(N0. 10 of 1989)
The Physical Planning (Development Permission)
Regulations 1990

_____

GRANT OF OUTLINE DEVELOPMENT PERMISSION

_____

APPLICATION NO:PR 13997 BLOCK 7 PARCEL NO:60801/76

TO: THE YARD LTD.

In pursuance of powers conferred under the above mentioned Ordinance, the board hereby GRANTS in accordance with the terms and conditions authorized by the Ordinance, approval in principle 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 as described in your application for a grant of outline development permission dated 18/Jan/2019 and in the plans and drawings attached thereto, subject to compliance with the relevant statutory provisions and with the following conditions:
…
[conditions 1 to 64 were set out]

The reasons (s) for the imposition of the conditions(s) specified (or attached) is/are:

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One copy of the application and the accompanying plans and drawings are returned with this Grant.
Dated Signed: D. Lightbourne
Director of Planning

Notes…"

[The notes to the grant explain the meaning of outline development permission, that application for detailed development permission must be submitted within one year, and that all communications relating to the decision should be addressed to the Director of Planning, Department of Planning, Grand Turk.]

**The Judgment**

[42] The Chief Justice encapsulated the appellants' issues for argument in paragraphs 66-67 of her judgment and dealt with them seriatim.

[43] With respect to the treatment of the application as one for rezoning the Chief Justice opined at paragraph 88 that the essence of what s. 39(2) and (3) are intended to achieve is a change of use of land inconsistent with its present zoning in the land use zoning plans. She stated this apparently on the basis that although not expressly mentioned in the PPO, clause 1.3 of the TCI Development Manual dated 28 April, 2014 to Schedule 1 of the Turks and Caicos Islands Building Regulations provides that the land use zoning plans must be complied with in applying for development permission. It reads as follows:

"1.3 *Land Use Zoning Plans*

*The land use zoning plans form part of the development plans prepared for the Turks & Caicos Islands and shall be complied with during the planning stages of any development. Decisions on applications for development permission will depend on compliance with the land uses zoning plans (Ref s.27 Physical Planning Ordinance).*

[44] The Judge found:

*"100. Thus, the decision, and indeed the act of Cabinet (Governor in Cabinet), to so approve the change of zoning of Parcel 60801/76 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.*

[45] She also stated (at paragraph 101) that *"... Cabinet 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) Tourist Related Development, to permit the development there at.

[46] The Chief Justice made a finding of fact that the application was treated by the authorities as an application for rezoning. At paragraphs 86 and 87 she stated:

*"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."*

[47] The Chief Justice nevertheless expressed the view that the application was not one of change in zoning but an application for an ODP that was inconsistent with the approved plan and that the Board's act was not ultra vires its powers. She said this at paragraph 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."*

**Discussion**

[48] All parties agreed that there was no provision in the PPO which allowed an application for rezoning and therefore, a grant of permission. Section 41 of the Ordinance makes provision only for the following applications: (a) Outline Development Permission, (b) Detailed Development Permission (c) permission to subdivide land, and (d) permission to display an advertisement. This was an application under s.41(a).

[49] At first glance the appellants appear to be right in the first of their 12 grounds of appeal insofar as it applied to rezoning, that the Chief Justice misdirected herself and erred in law [in paragraph 100 of her judgment] that the Cabinet and the Governor by virtue of s.39(2) had the power to approve a change of zoning for parcel 60801/76. A rezoning could only take place by way of modification of the NDP. That procedure is set out in section 37(2) of the PPO, and under s.37(3) the process must follow the protocols for approving a plan in the first instance.

[50] The process for approving a national development land use plan is set out in sections 34 to 37 of the PPO. It is initiated by the relevant government agency, either the DOP or the Minister, and has its own protocols of filings, advertisement in the Gazette and elsewhere, public consultation, a waiting period of at least 2 months, an approval process by the Governor, and the depositing of the final plan in various public places. It is a process which has been initiated about 2 years ago to update the current NDP. Under s.37(3), essentially, that same process is required to modify a national development plan.

[51] Section s.37(2) imposes a duty on the DOP to keep under review the operation of any plan in the light of changing circumstances in the area in which it applies, or for any other reasons which in his opinion requires such review, and if he considers it desirable he may prepare proposals for the modification or revocation of any plan and shall submit the same to the Minister, and under s.37(3) *"…the provisions of this Ordinance with respect to the preparation, consideration and approval of a development plan shall apply with such modifications as the circumstances require to the preparation, consideration and approval of the modification or revocation of a plan."*

[52] There are no similar provisions for a private landowner who applies for permission to develop his property.

[53] However, by s.39(2), cited above (Para [26]), Parliament has provided a means whereby private landowners may, without going through the statutory modification of the NDP as set out in sections 34 to 37, obtain permission from the authorities to depart from the land use as set out in the NDP. The requirement for submission by the Minister to the Governor and the Governor's approval before permission can be granted, assures that the application is dealt with at the highest level.

[54] Not every development inconsistent with the NDP would have the effect of rezoning a particular piece of property. Undoubtedly, in this case, however, the inconsistency was material in that approval of the development will have that effect, without going through the s.34 – s.37 statutory process. This was clearly recognized by the DOP in requiring several re-advertisements of the development to specify to the public that the inconsistency being considered was a departure from the ODP in relation to parcel 60801/76. That was the proper and fair thing to do, and was a material consideration to bring to the attention of the Governor

[55] The Chief Justice essentially recognized this in her judgment when she stated at paragraph 125:

> *"The argument that the Governor in Cabinet or the Board breached such a duty,* [not to approve any development inconsistent with the Plan] *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 s39(2), could not be a breach of duty on the part of the Board or the Governor in Cabinet to secure consistency."*

[56] The provision of the s.39 process in this case is entirely consistent with the Policy of the government recognized by this Court in the ***Proprietors of Strata Plan No 108 & Ors v The Governor & Ors*** CL-AP 24/2016, March 2017, namely to promote and develop hotel and tourism development in TCI, and with s.26. Evidently, it is also consistent with the overall policy in the PPO to allow the development application process to proceed expeditiously. That public policy is evident from the provision in s.42(4) which places a time limit of 6 months on the Board to consider an application (subject to extension for good cause), and by s.43 which provides for expedited applications (by Ordinance 21 of 2016).

[57] The Chief Justice at paragraph 104 concluded 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 to proceed with its decision to make a conditional grant of the application.

[58] Mr. Katan QC's case is that the decision by the Cabinet to rezone was unlawful as there is no power under the PPO for the Cabinet to rezone and so the Chief Justice's statements in paragraph 100 of her judgment which attribute that power to the Governor in Cabinet is wrong.

[59] However, on a careful reading, in paragraph 100 the Chief Justice referred to the act of Cabinet to "so" approve the change in zoning. To "so approve" appears to mean by way of approving an application for a development inconsistent with the NDP. She clearly considered a decision to rezone simpliciter, and a decision to approve a development inconsistent with the plan which resulted in a de facto rezoning as being equivalent. Accordingly, she referred to the distinction sought to be drawn by Mr. Katan QC as "splitting Hairs" (paragraph 97).

[60] The Action Point of 6 November, 2009 also blurred the distinction but applying ordinary rules of construction must be construed in the context of all that had happened including that it was known by all concerned that the grant of ODP would be approving a *de facto* rezoning. However, by condition 4 of the ODP the DOP made it clear that it was not intended to approve a *de facto* rezoning of the whole of Parcel 60801/76 but the departure from the NDP was only in relation to part of that parcel. It states:

> "4. Planning consideration is only given to the proposed hotel development (Phase 1-The Bight Hotel) including the support infrastructure (swimming pools, reception, restaurant, bar, gym and kid's centre and spa) and ancillary facilities. All other future phases of the development shall be the subject of separate planning applications for consideration and determination."

[61] The Chief Justice's statements at paragraph 100 and 101 taken together appear to properly state the position, although as Mr. Katan QC is correct that approving a development inconsistent with the NDP appeared to have been conflated with directly approving a rezoning. The Chief Justice was also not strictly correct to say that the decision was to approve a change of zoning for Parcel 60801/76, because having regard to condition 4 it only had the effect of approving a part.

[62] However, the DOP granted the ODP for the purpose for which the Interested Party applied. This occurred 2 days after a meeting with the Governor in Cabinet where on 6 November,

2009 he had given his approval. There was clear evidence that the two preconditions provided by statute namely "*appears to [the Board] 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"*, and the Action point proved the Governor's approval of the fact that in approving the inconsistency it would result in a *de facto* rezoning of part of the parcel. In whichever of the two ways the decision is formulated, from the Record it is apparent that a decision was made to approve a development that was inconsistent with the NDP, and everyone understood that the effect would be the *de facto* rezoning of that part of Parcel 60801/76.

[63] The ODP is valid on its face and having regard to all the surrounding circumstances nothing expressed therein reflects an unlawful decision of the Cabinet (the Governor in Cabinet) or the Physical Planning Board and there is nothing to challenge the valid use of the s.39(2) procedure. The Chief Justice was essentially right.

***Failure to give reasons***

[64] The Chief Justice held and the appellants conceded that in the absence of a statutory requirement to give reasons the appellants cannot hold themselves entitled to it.

[65] There is no right or presumption at common law that reasons should be given in planning cases. In the case submitted by Mr. Katan QC [1] Elias, LJ confirmed that at paragraph 29 where he stated:

> *"It is firmly established that there is no general obligation to give reasons at common law, as confirmed by Lord Mustill in the ex parte Doody case. However, the tendency increasingly is to require them rather than not…*"

[66] The Chief Justice drew attention to s.19 of the Constitution which gives an aggrieved person a right to reasons if the decision of the government adversely affects him and was not lawful, rational, proportionate and procedurally fair. Section 19 of the 2011 Constitution provides:

> "*Lawful administrative action*
>
> *19. (1) All decisions and acts of the Government and of persons acting on its behalf must be lawful, rational, proportionate and procedurally fair.*
>
> *(2) Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act."*

[1] ***Oakley v South Cambridgeshire District Council and Satchell*** [2017] EWCA Civ 71

[67] The Chief Justice declined to decide on the point because she concluded that there was no evidence that they had made a request which had been denied.

[68] However, in their letter before action dated 4 December, 2019 the defendants did request reasons, but more fundamentally it is not clear that they had asserted a claim to such a constitutional right before her, and made a claim that it had been or was being infringed. On principle, this being a civil case, we therefore ought not to exercise jurisdiction to consider the issue.

[69] The appellants sought to rely on ***Oakley*** where at paragraph 30 Elias, LJ expressed the view that it may be more accurate to say that the common law is moving to the position that whilst there is no universal obligation to give reasons in all circumstances, in general they should be given unless there is a proper justification for withholding such reasons. However, Mr. Katan QC admitted that ***Oakley*** was fact specific and can be distinguished from this case, being under a different legal regime concerned with the departure from ordinary policy in a specially protected area in England called the Green Belt.

[70] Furthermore, on the Record as stated by Ms. Libby Charlton without objection the respondents voluntarily disclosed every piece of documentation which the appellants requested even some in respect of which privilege could have been claimed. And so, it seems to us they may not have a legitimate ground of complaint.

[71] Section 42(3) of the PPO provides for the giving of reasons to the applicants whether the application is granted or refused but there is no similar provision in the PPO relating to objectors. It would be for Parliament to consider whether it should add a similar provision for third parties.

***Legitimate Expectation***

[72] The appellants seem to be advancing the case that a landowner or person wishing to purchase land has a legitimate expectation that the published plan of the zoning of land in Providenciales can be relied on and would be adhered to unless there is good and lawful reason to depart from it. In such a case the appellants argued that there should be full consultation and/or full reasons for doing so. Persons with properties next door or near to such developments fear that there may be "spot rezoning" or what one objector said could result in "a ribbon creep of commercial property" next door.

[73] The appellants may well have a reasonable expectation that a hotel will not be built next door or near to their property zoned as residential on the NDP, but a reasonable expectation is not necessarily a legitimate expectation in law. The latter requires a lawful representation

from an authority which is "clear, unambiguous and devoid of relevant qualification" (***R v Inland Revenue Commissioners Ex p MFK Underwriting Agents Ltd*** [1990] 1 WLR 1545 at 1570 as cited by Sir Keith Lindblom for the Board at paragraph 73 of ***Silly Creek*** *cited above at Para [27]*). While it may be said that the NDP constitutes a representation that is clear and unambiguous, it cannot be said to be unequivocal. The PPO itself provides that applications may be made for developments which are inconsistent with the NDP and it does not exclude inconsistencies which have the effect of rezoning a particular property. A representation which does not contain all three essential ingredients cannot form the subject matter of a legitimate expectation in the legal sense as set out in the prevailing authorities (see *United Policyholders Group and Others v The Attorney General of Trinidad and Tobago* (2016) UKPC 17 remarks by Lord Neuberger at paragraph 37.)

[74] The only legitimate expectation which the appellants could have was a right to be heard and to be treated fairly. The right was respected by the extensive consultation provided by the DOP including being given the opportunity to make their views known both in writing and in person. (The minutes of the 703rd meeting of the Board dated 25 July, 2019 confirms that Mr. Eric LeVin in opening his presentation introduced his team). However, the representation was always equivocal; there was always the possibility that the statutory right of the government to approve a development under s.39 inconsistent with the NDP could be invoked, and there was never any representation that it would not be a hotel. That is what happened here and that is what Parliament intended.

[75] The Record supports the view that the application came within the ambit of s.39, namely that the Board or the Minister (1) thought that the application was inconsistent with the plan but (2) considered that permission should be granted. Other evidence was from Mr John Redmond, a very experienced architect practicing in the field in the Turks and Caicos for many years who confirmed that there were many similar applications over the years inconsistent with the NPD which were granted permission under s.39. He gave examples which are set out in the Record.

***The EIA***

[76] We have considered the arguments of the appellants in relation to the need for an EIA before the issue of the ODP, and we have also considered the arguments for the respondents and for the Interested Party quite forcefully made by Mr. Griffiths QC. It is undoubtedly in the discretion of the DECR at what stage it will require an EIA. Cogent reasons including costs, time of preparation, and the nature of the ODP were given to support why it should await the submission of the application for final approval. The terms of reference as foreshadowed by condition 6 of the Grant of ODP were not communicated by Tshora Hyman on behalf of the DOP until her letter of 5 February 2020. We have not been

persuaded by Mr. Katan QC having regard to all the circumstances including the nature of the ODP and the conditions which attach thereto, including the preparation of an EIA, that the Chief Justice was clearly wrong to decide that DECR had properly exercised its discretion to await the submission of the EIA with application for final approval.

**Conclusion**

[77] For the reasons set out in her judgment the Chief Justice found that the executive acted within its boundaries and therefore the decisions were not *ultra vires*. The Record also supports the Chief Justice's finding that the proper procedure was used. No persuasive case was made out in respect of failure to give reasons, failure to meet legitimate expectations, and failure of the DECR to exercise its discretion to require an EIA prior to an application for final approval. For those reasons it is not possible to say that the judge was clearly wrong in reaching her determinations.

[78] For all the above reasons we dismiss the appeal. We invite written submissions from the parties on the issue of costs, such submissions to be filed on or before 30 June, 2021.

Dated this 3rd May, 2021


Neville Adderley
Justice of Appeal

I agree

Humphrey Stollmeyer
President

I also agree

Stanley John
Justice of Appeal