IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

Cause No: G0244/2014

IN THE MATTER OF THE DEVELOPMENT AND PLANNING LAW (2011 REVISION)

AND IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE PLANNING APPEALS TRIBUNAL IN RESPECT OF BLOCK 13B PARCEL 202

BETWEEN:

GRAND VIEW STRATA CORPORATION

APPELLANT

AND:

1. **THE PLANNING APPEALS TRIBUNAL (PAT)**
2. **BRONTE DEVELOPMENT LTD.**

RESPONDENTS

Appearances:

Mr. Neil Timms Q.C. for Grand View

Mrs. Suzanne Bothwell and Mrs. Marilyn Brandt of the Attorney General's Chambers for the Planning Appeals Tribunal

Mr. Jalil Asif Q.C. and Ms. Philippa McFarlane of Kobre & Kim of Bronte Development

GRAND COURT CAYMAN ISLANDS

Before: **Mr. Justice Seymour Panton**

Heard: **21st, 22nd, 29th and 30th September 2015**

JUDGMENT

1. On 5 December 2014, the Planning Appeal Tribunal (PAT) handed down its reasons for dismissing the appeals of Grandview Strata Corporation (Grandview) and two other parties against the decision of the Central Planning Authority (CPA) to grant permission to Bronte Development Ltd ("Bronte") to construct two sets of apartments on land at Snooze Lane, George Town Grand Cayman. By an amended notice of originating motion, dated 19 December 2014, Grandview filed an appeal against the decision of the PAT. This judgment deals with Grandview's latter appeal.

2. Grandview is seeking a reversal of the decision of the PAT, and that the "planning[1] permission" granted to Bronte be also reversed and refused.

3. Bronte's application for permission to build was filed with the Department of Planning on 11 October 2013. Thereafter, that Department issued notices to persons who may be affected indicating that the application was available for inspection by them, and inviting them to object to or support the application if they wished. The Department also notified several agencies of the application and invited comments and or recommendations from them.

GRAND COURT CAYMAN ISLANDS

4. There were several objections by property owners, and there were also comments and recommendations by the various agencies. In the end, the CPA granted the application subject to certain stated conditions.

5. The grounds of appeal that were dealt with by the PAT are similar, in substance, to the grounds that were argued, with much force, and at great length, by the Appellant before me. I find it convenient at this stage to summarize what I regard as the main points in the judgment of the PAT. They are as follows:

[1] The CPA's permission

i. The PAT's jurisdiction is limited to adjudicating on decisions made by the CPA on matters that fall within the ambit of the four grounds set out in s.48(1) of the Development and Planning Law. There is no power to conduct a "*de novo*" hearing;

ii. The regulations indicate an intention on the part of the legislature to require buildings over three storeys high to have a setback of a total of 145 feet from the high water mark;

iii. The regulations provide for a minimum restriction of 20 feet for side setbacks (with a discretion to increase);

iv. The CPA acted appropriately in exercising its discretion to vary the setback so that the pool on the existing plans is in alignment with the adjacent property;

v. The weight of the comments and recommendations from the various government agencies including those from the Department of the Environment was properly assessed by the CPA;

vi. The CPA fulfilled the requirements of the Law as regards notifying all concerned of the application by Bronte, and there was no breach of the principles of natural justice;

vii. The reasons provided by the CPA were adequate, although there is "the need for improvement generally";

GRAND COURT CAYMAN ISLANDS

viii. The Development Plan[2] has to be viewed in the light of the subsequent amendments to the Development and Planning Law and the Regulations;

ix. It is "pure speculation" to submit that the development will have an adverse effect on tourism; and

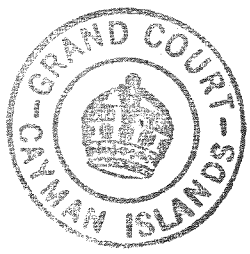
x. The National Conservation Law was not in force at the time the application was considered, and so could not have formed part of the deliberations of the CPA.

6. The Appellant is challenging the decision of the PAT on grounds which were filed with the Clerk of the Courts on 22 December 2014 and which I also now summarize:

i. The PAT has erred in law in its interpretation of s.48 of the Development and Planning Law as regards the question of a rehearing;

ii. The PAT failed to consider and determine that the CPA erred in law in not applying the policies set out in the Development Plan, and the PAT failed to exercise its own judgment as to whether or not granting permission would be at variance with the Plan[3];

iii. The PAT failed to consider and determine that the CPA erred in law in failing to take into account the adverse comments of the Department of the Environment, and the lack of any environmental study especially given the proposals for underground parking;



[2] See paragraph 12 of this Judgment
[3] The Development Plan (see paragraph 12 of this Judgment)

iv. The PAT failed to consider and determine that the CPA erred in law in applying the wrong test to determine the planning application;

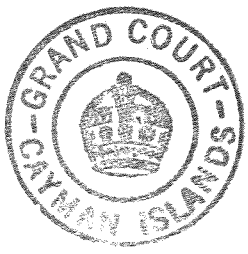
v. The PAT failed to consider and determine that the CPA erred in its understanding of Regulations 8(10)(e) and 10(1)(f) in relation to setbacks and side setbacks;

vi. There was procedural unfairness on the part of the CPA; and

vii. The PAT failed to consider and determine that the CPA erred in law and/or unreasonably failed to take into account or evaluate the impact of the development on tourism.

7. Before dealing with the submissions made by the respective parties, I think it appropriate to mention the law and regulations that are relevant for consideration in the determination of applications for planning permission in the Cayman Islands.

The foremost piece of legislation that applies to this application is the Development and Planning Law (2011 Revision) ("the Law"). It establishes the CPA and provides a framework for the CPA's consideration of applications for permission to carry out developments. The Law at s.6 states that the CPA shall:



> *"(a) consider the likely impact of the proposed development on the infrastructure of the Islands as well as on the educational, social, medical and other aspects of life in the Islands;*
>
> *(b) consider whether there are other issues of national importance which are relevant to the determination of the application for development and require evaluation;*
>
> *(c) consider whether there are technical or scientific aspects of the proposed development which are of so unfamiliar a character as to jeopardise a proper determination of the question unless there is a special inquiry for the purpose;*
>
> *(d) identify and investigate the considerations relevant to, or the technical or scientific aspects of, the proposed development which, in its opinion, are relevant to the question whether the application should be approved; and*
>
> *(e) ..."*

8. In addition, the CPA shall, to the greatest possible extent consistent with its duties, consult with departments and agencies of the Government that have duties, aims or objectives related to those of the CPA[4].

9. The Law establishes a department of Government called the Department of Planning, and provides for the appointment of a Director of Planning and such other officers as are necessary for the proper exercise of the functions of the CPA. These officers are responsible for the administration of the CPA, including preparing agendas and minutes and communicating and implementing the CPA's decisions. The Director has a duty to make to the CPA such recommendations as may appear necessary for the implementation of the Law[5].

GRAND COURT CAYMAN ISLANDS

[4] S.7 of the Development and Planning Law (2011 Revision) ("the Law")
[5] S.4 of the Law

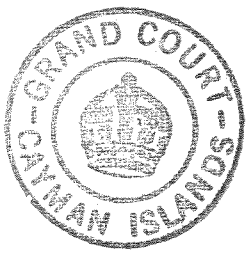
10. Section 13(1) of the Law provides that, except where otherwise provided for by the Law, permission to develop land shall not be given which would result in development that is at variance with a Development Plan. And s.15(1) authorizes the CPA to grant permission either unconditionally, or subject to such conditions as it thinks fit, or to refuse permission.

11. The relevant regulations for the purpose of this appeal are the Development and Planning Regulations (2013 Revision) (hereinafter referred to as "the Regulations"), with particular reference to Regulations 5, 8 and 10 thereof.

Regulation 5 provides that the control of development shall be in accordance with these Regulations and the Development Plan, but the CPA may give permission for development deviating from the Regulations so long as it is in keeping with the Development Plan.

Regulation 8 deals with parking, height of buildings, setbacks and the giving of notices to neighbouring owners.

Regulation 10 deals specifically with hotel/tourism related development. It reads thus, in part:



"10. (1) *Hotels, cottage colony developments and apartments are permitted in Hotel/Tourism development zones if they comply with the following requirements:*

(a) The maximum number of bedrooms for hotels is sixty-five per acre;

(b) The maximum number of apartments is twenty-five per acre;

(c) The minimum lot size for hotels and apartments is half an acre with a minimum lot width of 100 feet;

(d) The minimum lot size for residential development within a hotel zone is 12,500 square feet and the minimum lot width 100 feet;

(e) The maximum site coverage for hotels and apartments is forty per cent of the lot size;

(f) The minimum side setbacks are a minimum of 20 feet;

(g) The minimum rear setbacks are 25 feet from the road edge or lot boundary as the case may be; and

(h) In the case of a cottage colony development-

i. The maximum number of cottage units is ten per acre;

ii. No cottage unit contains more than two bedrooms; and

iii. *The maximum site coverage is twenty-five per cent of the lot size.*"

GRAND COURT - CAYMAN ISLANDS

12. The Development Plan is referred to as a "Planning Statement for the Cayman Islands" and in the Statement itself, it is said that where there is a conflict between the Regulations and the Planning Statement, the Regulations shall prevail.

> *"The general aim of the [P]plan is to maintain the quality of life in the Cayman Islands by effectively directing development so as to safeguard the economic, cultural, social and general welfare of the people, and subject thereto the environment*".

The primary objective, according to the Development Plan, is to:

> *"...maintain and enhance the Cayman Islands and the well-being and prosperity of its people subject thereto its environmental character*".

The Development Plan states that there is an intention to develop a planning strategy which is flexible enough in concept and implication to accommodate individual requirements, special circumstances as well as changing conditions. There is the requirement for the striking of a "careful balance" "between what is a valuable natural feature and a desirable development".

13. The Development Plan also contains the following statement:

> *"The provisions for development setbacks are for achieving the following purposes:*
> *(a) To provide adequate natural light, ventilation and privacy to all buildings;*
> *(b) To provide amenity space and to facilitate landscaping around buildings;*
> *(c) To maintain and enhance the quality and character of development fronting a road;*
> *(d) To provide a buffer between buildings on neighbouring lots; and*
> *(e) To avoid or minimize any negative impact the development or use of one lot may have on the occupants of a neighbouring lot."*

14. In relation to the hotel/tourism zone, the Development Plan states that development:

> *"... will be carefully regulated to ensure that the needs of the tourist industry are met and that new buildings will in general be related to the needs of the industry."*

The Development Plan provides as follows:

> *"The Authority shall apply the Hotel/Tourism Zone provisions and other relevant provisions of this Statement in a manner best calculated to:*
> *(a) Provide for the orderly development, expansion and upgrading of facilities required to maintain a successful tourism industry;*
> *(b) Ensure that all development enhances the quality and character of the Cayman Islands' hotels and cottage colonies;*
> *(c) Prevent the over-development of sites and to ensure that the scale and density of development are compatible with and sensitive to the physical characteristics of the site;*
> *(d) Ensure minimal traffic impacts on surrounding properties and existing public roads;*
> *(e) Ensure that waterfront developments are designed to avoid interference with natural coastal processes; and*
> (f) *Ensure adequate allowance for public access to the sea.*"

The Development Plan goes on to say:

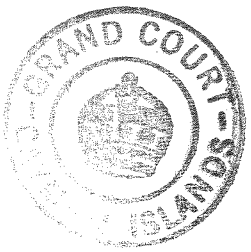
> *"The Authority shall take into consideration the characteristics of the form of tourist accommodation proposed and shall be satisfied that the layout, scale and massing of development are compatible with the ecological, aesthetics, and other physical characteristics of the site; and that a high quality of design and landscaping are used.*"

GRAND COURT - CAYMAN ISLANDS

15. Given the conclusion that I have arrived at, I do not find it necessary to deal with each and every ground of appeal in detail. I shall deal only with those points that I think are important for the resolution of the appeal.

16. It became clear to me that the question of the fairness of the procedure was the main topic of discourse by the appellant. The second most important aspect was whether the Development Plan and the regulations had been complied with, and finally, there was complaint made in respect of the alleged failure of the CPA to give reasons for its decision.

17. Without going into the submissions, but with great regard for them, I wish to say at the outset that I agree with the PAT's interpretation of its powers under s.48 of the Law as regards rehearing. The words of the legislation are clear. An appeal to PAT is to be considered on the basis of the printed record. If there is to be a rehearing in the sense of calling witnesses, the PAT is empowered to direct the CPA to undertake such.



ALLEGED PROCEDURAL UNFAIRNESS

18. Mr. Neil Timms, QC, on behalf of the Appellant submitted that there was procedural unfairness on the part of the CPA, and that this vitiated the decision. In fact, he said that "the central point by the appellant is the unfairness of the proceedings". The unfairness, he said, was demonstrated in three respects, and the legal position was that it was unnecessary for the objectors to demonstrate a possibility that the decision would have been different had it not been for the procedural unfairness. The three areas of unfairness listed by him were:

i. The CPA did not provide the objectors with the comments from the various government departments and agencies prior to the hearing of the application by the CPA.

ii. It appears that at the hearing of the application before the CPA, a submission was made on behalf of Bronte comparing the instant application with a previous application that had been approved. The objectors had no details about this previous application so could not have commented thereon. The CPA, it is felt, was unduly influenced by this earlier decision although there is nothing in the record to say that they were.

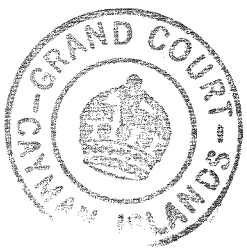
iii. The CPA apparently relied on certain facts which were not disclosed at the hearing. This latter characterization bears some similarity to the complaint in number (i) above, so they will be dealt with together.

GRAND COURT - CAYMAN ISLANDS

19. With regard to the comments of the various departments and agencies not being "provided" to the objectors in advance of the hearing, Mr. Timms complained that this was instead done when the minutes "were served". In contrast, he said, it seems that Bronte received all the material before the hearing. This, he said, demonstrated a systemic unfairness by the Planning Department which the CPA has adopted as policy.

20. In their submissions before me, however, counsel for Bronte said that the statement relating to what Bronte had received from the CPA is incorrect. Counsel for Bronte said Bronte did not receive the report of the Department of Environment until at the hearing before the CPA, whereas it seemed that the objectors had been provided with it earlier.

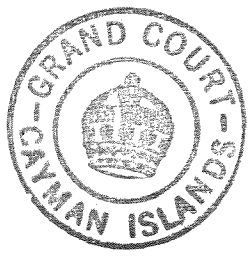
21. Mr Jalil Asif, QC, submitted that the Appellant's contention in this regard demonstrates a lack of understanding as to the "planning procedure". The CPA, he said, on receipt of an application, immediately engages in a process of consultation with the applicant and the relevant government departments and agencies with a view to identifying and addressing any concerns raised. After discussions and receipt of comments, the plans submitted by the applicant may be revised as necessary. When the developer's plans have been finalized and submitted to the CPA, the application is then listed for adjudication. Notices are then sent out to relevant parties within a certain radius of the proposed development as required by the Law. They are given a period of twenty-one (21) days to view the plans and a hearing date is set.



The CPA does not distribute the correspondence between itself, the applicant and the various agencies and departments. Mr. Asif submitted that that would be impractical and inappropriate. In any event, the Law, he said, does not require that to be done. The CPA publishes on its website all the comments of the agencies on the final plans along with a copy of the agenda for the meeting on the Monday prior to the hearing of the application.

22. Mr Asif pointed out that some objectors and Mr. Timms were at the hearing, but they made no objection or observation in relation to the instant complaint and, in addition, there was no application for an adjournment.

23. The record of appeal shows that Bronte's application for permission to develop the property was filed on 11 October 2013. On 18 October 2013 numerous notices were sent out to the relevant neighbouring property owners indicating the nature of the proposed development and stating that the application "can be inspected at the Planning Department". The location of the Department was given in the Notice, and the receiver of the Notice was informed that he or she may object or support the application in writing – stating the precise grounds for doing so. This was to be done within twenty-one (21) working days of the 18 October 2013. The regular postal address, the e-mail address and the fax number of the Director of Planning were supplied in the Notice.

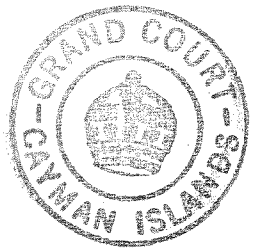


24. The Director of Planning received several letters objecting to the application. The objectors articulately stated their reasons for objecting.

25. The Director of Planning then sent written invitations to the objectors to attend and address the CPA on 18 December 2013. If they were unable to attend, he wished to know whether they would like their objection to be read into the minutes of the meeting.

26. The meeting of the CPA was duly held on 18 December 2013 commencing at 10:00 a.m. in the conference room on the first floor of the Government Administration Building. It was the 27th meeting of the CPA for the year. There were fifteen members of the CPA present, including the chairman and deputy chairman. There were written comments from the Department of Environmental Health, the Water Authority, and the National Roads Authority. Those were read into the minutes, as also the letters of most of the objectors and the "Planning Department Analysis". Incidentally, each objector had been advised that he or she would be allowed up to 10 minutes to address the CPA. Ten objectors, including Mr. Timms, QC, were present at the hearing.

27. As stated earlier, the CPA granted the permission sought subject to conditions which were listed. The CPA, in granting the application, said that it "*took into account the comments of the objectors*" but was of the view that "*they did not raise sufficient grounds for refusing planning permission*".

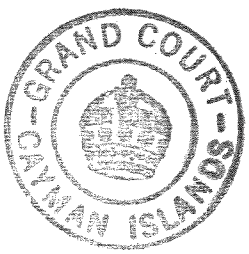


28. On this aspect of its complaints against the decision of the CPA, Grandview relied on ***R (Primary Health Investment Properties Ltd) v Secretary of State for Health***[6], ***In re D. (Adoption Reports: Confidentiality)***[7] and ***Hadmor Productions Ltd v Hamilton***[8].

29. The case ***In re D. (Adoption Reports Confidentiality)*** concerned an application by a mother to inspect two sections of a report of the *guardian ad litem* that expressed in detail the children's wishes and feelings towards their parents. The mother was opposing an application by her former husband and his new wife for the adoption of her two sons. None of the other parties to the proceedings, except the guardian ad litem, had been privy to the relevant sections of the report. The judge refused the application and the Court of Appeal dismissed the mother's appeal. However, the House of Lords allowed the mother's appeal on the basis that the fundamental principle of fairness that a party was entitled to the disclosure of all materials which might be taken into account by the court when reaching an adverse decision applied with particular force to adoption proceedings. Lord Mustill, in delivering the judgment, said at page 614D:

> *"...I am satisfied that the judge erred in giving no weight to the strong presumption in favour of disclosure which, for the reasons given, I believe should prevail in adoption proceedings. It is for this reason that I have concurred in the order allowing the appeal."*

Earlier, His Lordship had reasoned thus:

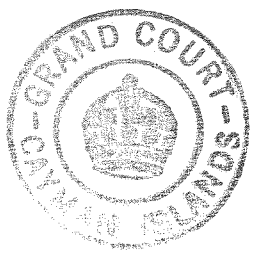


[6] [2009] EWHC 519 Admin
[7] [1996] AC 593
[8] [1983] 1 AC 191

> *"...it is a first principle of fairness that each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. The principle is lame if the party does not know the substance of what is said against him (or her), for what he does not know he cannot answer. The requirement of openness is particularly important in proceedings for adoption, not only because it may lead to the deprivation of parental rights, in the self-centred meaning of that word, but because a successful application to adopt brings about a total rupture of the mutual relationship of responsibility and dependency which is the essence of the parental bond. The unique character of the relationship which the parent will lose, and the general irreversible nature of the loss, make it specially important that in simple fairness to the parent he or she is aware of anything which may tend to bring it about. There is more to it than this, however, since fairness to a parent is a reflection of fairness to the child. The erasure of the bond with the natural parent and the creation of an entirely new set of responsibilities and dependencies shared with the adopters is an event of critical importance in the life of the child, whose paramount welfare demands that such a momentous step is taken only after a process which is as fair and thorough as can be devised."*

30. This case ought not to be regarded with any comfort by Grandview as it is related to adoption proceedings specifically. The Adoption Rules provide that a party referred to in a confidential report supplied to the court may inspect that report for the purposes of the hearing, subject to any direction given by the court. In the instant case, there is no provision for the inspection of any communication between the CPA and the government agencies. Furthermore, the objectors were not parties to the proceedings.

31. ***Hadmor Productions*** involved an interlocutory appeal in an action between a television production company and certain officers of a trade union. The judge at first instance refused to grant an injunction but the Court of Appeal reversed him. The House of Lords allowed the appeal.



Lord Diplock referred to the fact that in the Court of Appeal Lord Denning, MR, had looked at ss.(8) of s.17 of the Employment Act 1980, "*in isolation, divorced from all other provisions of the section of which it formed a part*", and ended up with a conclusion that "*could never be reached by applying any of the accepted principles of statutory construction*". In seeking to justify his conclusion, Lord Denning referred to the report in Hansard of a speech made in the House of Lords by Lord Wedderburn. In disagreeing with the approach of the Master of the Rolls, Lord Diplock pointed out that Lord Denning had done this before without the support of any other member of the 5-member panel of the Court of Appeal. In fact, two members actually dissented in respect of this approach.

So, the quotation relied upon by Mr. Timms, QC, from Lord Diplock's speech at 233 B-C is a commentary on what Lord Denning had done.

This is what Lord Diplock said:

> "*Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is. In the instant case counsel for Hamilton and Bould complained that Lord Denning M.R. had selected one speech alone to rely upon out of many that had been made in the course of the passage of what was a highly controversial Bill through the two Houses of Parliament; and that if he, as counsel, had known that the Master of the Rolls was going to do that, not only would he have wished to criticize what Lord Wedderburn had said in his speech in the House of Lords, but he would also have wished to rely on other speeches disagreeing with Lord Wedderburn if he, as counsel, had been entitled to refer to Hansard.*"

GRAND COURT - CAYMAN ISLANDS

The rule, reminded Lord Diplock, is that "*recourse to Hansard is not permitted as an aid to the construction of an Act of Parliament*", and it is the duty of counsel to observe it "*in the conduct of their clients' cases before any English court of justice.*"

32. I agree with Mr. Timms, QC, that one has to be careful when comparing an objector in the statutory scheme of the United Kingdom with an objector in the Cayman Islands. This, he said, is necessary in considering cases from the United Kingdom. However, I think that the case ***Vicente v Secretary of State for Communities and Local Government***[9], cited by Mr. Asif, QC, is a useful guide in the determination of the instant point in the matter before me. In the ***Vicente*** case, which dealt with what is required for procedural fairness in an administrative or quasi-judicial process, Lewison, LJ , said he did not consider that fairness required that the objectors to an application for planning permission were to be able to listen to every single word that the inspector heard at the hearing[10]. Burnett, LJ, said that the circumstances are "*necessarily fact and context specific.*"[11]

33. In the instant case, that is, on appeal before me, the objectors were notified of the hearing and given ample opportunity to state their objections. They took advantage of the opportunity to put their objection and reasons therefor in writing. Several attended the hearing. Others indicated in writing that they would not be attending. The minutes of the meeting indicate that their reasons were stated by them with much clarity. They really had no need for information from the government agencies, as their objections were not based on anything flowing from the agencies. They had their own reasons.

[9] [2014] EWCA Civ 1555
[10] Para 32
[11] Para 19

There was no obligation on the CPA to provide the objectors with more reasons than they stated in their letters of objection. Nor was there any obligation on the part of the CPA to share the information they received from the agencies with anyone apart from the applicant. Furthermore, given the objectors' apparent level of education and their facility with the computer, I would be extremely surprised if they were not aware of the existence of the website of the Department of Planning and the contents thereon.

34. There was a further allegation of reliance by the CPA on undisclosed matters as regards the location of a commercial development directly across from the site, and Treasure Island being on the same lane as the development. It is interesting that Mr. Timms, in his written submissions, did what he complained of: he provided his own evidence of the location of Treasure Island. In my view, this particular complaint amounts to a mere quibble that can gain no traction.

35. The record of appeal at page 521 reads thus:

> "*Mr Lagan (for Bronte) explained the previous approval for the subject site and that this proposal is far less dense. He stated that they are prepared to work with the objectors and they feel they have worked hard to reduce the massing of the development.*"

36. Mr. Neil Timms, QC, said that there is nothing to indicate that the CPA discounted this statement, or regarded it as irrelevant or distinguished. Consequently, he submitted, the CPA appears to have taken it into account.

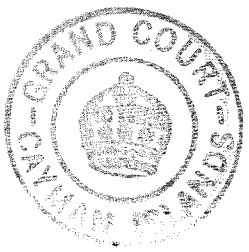
GRAND COURT - CAYMAN ISLANDS

37. I cannot say that I am impressed with this reasoning as it does not follow automatically that the failure to mention a matter means that it has been taken into account.

38. Mr. Timms submitted further that the CPA appears to have been unduly impressed by "this prior decision" and so committed an error of law that the PAT should have found. In its judgment, the PAT stated that Mr. Asif, QC, had noted that the Chairman of the CPA had expressly stated that the CPA was not bound by an earlier decision of the CPA. Having regard to that, the PAT concluded that it was irrefutable that the CPA had considered Bronte's application on its own merits. The PAT concluded that the CPA had acted independently of any previous decision.

39. Mrs. Suzanne Bothwell, who appeared with Mrs. Marilyn Brandt for the PAT, did not agree that an earlier decision of the CPA was irrelevant. On the contrary, she submitted that the existence of a planning permission or lapsed planning permission is recognized by the case law as a material consideration to be weighed by a planning authority. In support of this submission, she relied on the case ***New Forest D.C. v Secretary of State for the Environment***[12]. That case contains references to ***Spackman v Secretary of State for the Environment***[13] and ***South Oxfordshire D.C v Secretary of State for the Environment***[14].

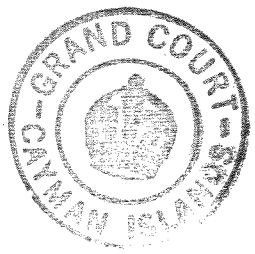
In ***Spackman***, it was accepted that the existence of a planning permission was a vitally material consideration for a planning authority.



[12] [1995] EGCS 136
[13] (1977) 1 All ER 257 at 261
[14] [1981] 1 WLR 1092 at 1096 E-H

In ***South Oxfordshire,*** it was contended on behalf of the planning authority that where development has not commenced before the time for commencement expires, on a fresh application, the earlier planning permission is no longer a relevant consideration which it is permissible to take into account in deciding whether or not to grant the fresh application. Woolf J (as he then was) held that a planning authority was not bound by a previous planning permission. However a pre-existing permission may be relevant or material for consideration, so long as the planning authority does not give it more weight than appropriate. There is a need for consistency, and an expired planning permission is part of the planning history of the site, he said.

40. In the circumstances, it seems to me that this question of the consideration of an earlier planning decision is a non-issue as there is no evidence that the earlier decision was taken into account by the CPA. However, if the CPA did take it into account, there was no error of law in so doing.



THE DEVELOPMENT PLAN – THE LAW AND THE REGULATIONS:

ALLEGED ERROR OF LAW BY THE PAT

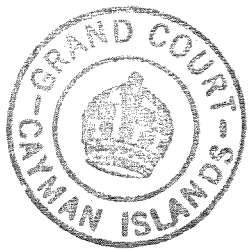
41. The CPA said that in arriving at its decision on the application, it had considered the analysis that had been done by the Planning Department, as well as the provisions of the Law and the Development and Planning Regulations (2013 Revision). It formed the view that the application was in keeping with the requirements of the Development Plan 1997, except for the pool setback and the required minimum setback from the high water mark.

42. So, in that regard, the CPA granted permission subject to the submission of a revised site plan showing the required setbacks. The order for the submission of a revised site plan, said the CPA, was to ensure that the ten-storey building was in compliance with the required minimum setback from the high water mark. As regards the proposed pool, the CPA said that there was no need for the setback to be the same distance as the primary buildings as it is a minor ancillary feature which will not affect the neighbouring developments, and that is sufficient reason for allowing a lesser setback from the high water mark. In any event, by increasing the setback from the high water mark to 55 ft., the CPA reasoned that the location of the pool will be consistent with the setbacks of the neighbouring developments.

GRAND COURT CAYMAN ISLANDS

43. The PAT did not consider it appropriate to substitute its views for those of the CPA which, it said, had weighed the competing interests and approved the development. The PAT rejected as "pure speculation" the suggestion from counsel for Grandview that the development would have an adverse effect on tourism. There was no evidence to support the suggestion, said the PAT. As regards the character of the neighbourhood, the PAT said that the Development Plan, having been formulated in 1997, and there having been changes in the Regulations since then to permit higher buildings, there would necessarily be a difference in character between the older buildings and the newer ones.

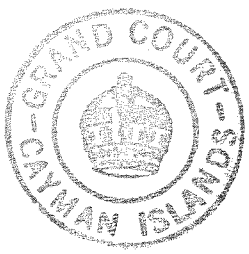
44. Mr Timms, QC, submitted that the PAT erred in failing to find that the CPA had erred in not applying policies stated in the Development Plan. He quoted from the Plan to indicate that there is a requirement that in the zone in question, there be careful regulation "*to ensure that the needs of the tourist industry are met and that new buildings will in general be related to the needs of the industry*". Those needs, he said, include "those of the condominiums adjacent to the site and the Island generally". He said, quoting from the Development Plan, that the CPA had to satisfy itself "*that the layout, scale and massing of the development are compatible with the ecological, aesthetics and other physical characteristics of the site and that a high quality of design and landscaping are used*".



45. The learned Queen's Counsel was very critical of the CPA, saying the CPA did not consider the Development Plan's provisions adequately or at all, and that it either ignored the various heads of consideration or treated them with casual indifference. The CPA, he said, had a responsibility "to prevent overdevelopment of sites (not simply a question of density) and be sensitive to its characteristics and scale". He added that it had to make a series of value judgments using the criteria in the Plan and there is no evidence that it "balanced any of these things". He was equally critical of the PAT for applying what he described as "its own tortuous reasoning" in order to conclude that the CPA had taken the Development Plan into account.

46. Mrs. Bothwell, for the PAT, noted that the introductory statement to the Development Plan indicates that the Plan is to be regarded as guidelines to be applied with flexibility, understanding and commonsense by the CPA. She submitted that there are quite a few regulations that were brought into force after the Development Plan and in the circumstances, there ought not to be a slavish following of the Development Plan, to the exclusion of the Regulations.

47. Mr. Asif, QC, also expressed the view that the Development Plan should not be slavishly followed, and that the CPA and the PAT cannot be hidebound by a Development Plan that is 20 years old. He cited the Cayman Islands case ***Cortina Villas v P.A.T***[15] in which Sanderson J quoted and adopted a passage at page 557 of the fifth edition of *Judicial Review of Administrative Action by De Smith - Woolf, and Jowell.* That passage cautioned against a slavish adherence to government circulars or development plans.



[15] [2000] CILR 360

48. Without suggesting at this time that there has been a non-adherence to the Development Plan, it may be useful to say that, in my opinion, non-adherence has to be in a significant way on a matter of great importance for a planning permission to be overturned. The foremost consideration is whether there has been general compliance with the Law and the Regulations made thereunder.

49. In ***Simpson v Edinburgh Corporation***[16], a case involving planning permission, the legislation provided that where application was made to the local planning authority for planning permission, the authority may grant permission either unconditionally or subject to such condition as they think fit, and in dealing with such application, the authority shall have regard to the provisions of the development plan, so far as material thereto, and other material considerations. This is similar to the legislation in the instant case. Lord Guest noted that the legislation obliges the authority to have regard to the provisions of the Development Plan. However, he said that he did not interpret the words "to have regard to" as meaning "slavishly to adhere to". He said that what was meant was that the planning authority was to consider the Development Plan, but there was no obligation to follow it. This interpretation is quite apt in the instant situation especially when it is considered that the Regulations take priority to the plan where there is a conflict.

50. The Department of Environment did not support the proposed development, on the basis that:

i. The scale, mass and density of development is inappropriate for this location and the site's constraints;

GRAND COURT - CAYMAN ISLANDS

[16] [1961] SLT 17

ii. The coastal setbacks do not reflect the location of the Mean High Water Mark – the siting of the buildings and ancillary structures should be updated based on the Mean High Water Mark; and

iii. The applicant has not provided sufficient supporting evidence to demonstrate that construction of these buildings is physically feasible.

51. This latter point on the physical feasibility of the buildings seems strange to me considering that the Department of Planning, which received the plans and which would obviously have in its fold, experts in this area, has not raised any concerns in this regard. I hardly think that this can be a proper basis for objection by the Department of Environment. As regards the setbacks, it has already been observed that the CPA gave certain directions when it granted permission with conditions.

52. It is therefore incorrect to put forward the idea that the concerns of the Department of Environment were not considered. The fact that the CPA did not agree with the Department of Environment does not mean that there was no consideration.

53. In respect of the scale, mass and density of the development, the CPA obviously did not see eye to eye with the Department of Environment on the matter. There is nothing to compel the CPA to see everything in the same manner in which that department sees it. Were it otherwise, then the Law would not have entrusted the decision-making power to the CPA.

54. When it comes to scale, mass and density, the CPA had other views that it had to take into account. Indeed, the Department of Environmental Health had no objections to the proposal. That department only required that full details on the proposed swimming pool be submitted for review and approval.

55. As far as road capacity issues are concerned, the National Roads Authority said that the impact of the proposed development onto Snooze Lane would be minimal.

56. It seems to me that the CPA considered the views of all the departments and the objectors.

57. Invariably in matters of this nature, there will be differences of opinion. One Grandview objector said that the development is to take place on the last remaining piece of land left over from the development of Treasure Island and Grandview, and that a ten-storey building will look ugly and completely overwhelm the views of this part of the beach. That which looks ugly to the objector will not necessarily be ugly to the CPA which is tasked with the responsibility of making the decision. As one writer puts it: "Ugliness is a point of view: an ulcer may be beautiful to a pathologist." It is perhaps more conventional to quote either Lew Wallace or Margaret Wolfe Hunger-Ford and simply say: "*Beauty is altogether in the eye of the beholder.*"

SETBACKS

58. Having considered the Development Plan, the Law and the Regulations, I am concerned as to how the area of setbacks was handled by the PAT and, indeed, the CPA.

59. As stated earlier, the Development Plan states the purposes of the development setbacks, and the Regulations provide the relevant measurements. There was clear concern of the CPA in this regard as it granted permission with conditions which include a direction for adjustments to be made.

60. The PAT commented on the age of the Development Plan and the fact that the Regulations have been changed over the years. However, the age of the Development Plan is really irrelevant as long as it remains in force. The legislature is fully aware of its existence and its age so if they think it requires updating, they will take the necessary action. In any event, where there is a conflict between the Plan and the Regulations, the latter will prevail. It is my view that there has been no demonstration of any conflict between the Development Plan and the Regulations as regards setbacks. So, I shall take a closer look at what is required.

61. There is no doubt that in dealing with a building's proximity to roads and the coastline, the provision for setbacks is very important. It is moreso, I daresay, on a small island. The relevant Regulations for consideration are 8(2)(e) and 8 (10)(e) of the Development and Planning Regulations (2013 Revision).

GRAND COURT CAYMAN ISLANDS

Regulation 8(2) deals with the height of buildings in the various zones, with a provision in 8(2)(e) that the maximum permitted height of a building in this particular zone is one hundred and thirty feet or ten storeys, whichever is less. The application here is for one of ten storeys.

Regulation 8(10) makes various specific provisions for waterfront property, which this property is.

In respect of a hotel/tourism zone, as this zone is, regulation 8 (10)(e) provides that:

> *"all structures and buildings up to three storeys...shall be setback a minimum of one hundred and thirty feet from the high water mark, with an additional fifteen foot setback for the third through the seventh storey".*

Critically, I think, there is no provision for a ten-storey structure. A subsequent amendment in 2014 to this Regulation clarified the measurements for the setback up to the seventh storey by increasing it to fifteen feet for each of the fourth through to the seventh storey; yet nary a word in respect of the eighth to the tenth storey.

62. Regulation 8(11) gives the CPA the power to grant permission for a setback to be located at a lesser distance than that prescribed in 8(10)(e). However, in doing so, the CPA must have regard for certain matters such as the elevation of the property and its environs, the geology of the property, the storm/beach ridge, the existence of a protective reef adjacent to the proposed development, the location of adjacent development and any other material consideration which the CPA considers will affect the proposal.

GRAND COURT - CAYMAN ISLANDS

63. It has to be stressed that this Regulation is very important, in my view. Matters relating to the geology of the property, the storm/beach ridge and the existence of a protective reef cannot be treated lightly, given the nature of the environment.

64. In its analysis, the Department of Planning pointed to the deficiencies in the proposed setbacks, and suggested that the CPA needed to determine if the lesser setbacks could be allowed. It is no doubt due to this suggestion that the CPA directed Bronte to submit a revised site plan with a setback of one hundred and forty five feet, ostensibly in keeping with the regulations.

65. Mr. Timms has vigorously challenged the CPA's decision in this regard and the failure of the PAT to have found that there was an error of law. He submitted that the CPA should have required Bronte to make a new application as there was now "*a materially different layout from the site plan*". He said that the new setback should be either 190 or 205 feet, depending on how one interprets the Regulation and/or the subsequent amendment. With that in mind, he said that "*the erection of the separate second four-storey building would not be physically possible and/or the application would be fundamentally flawed*". Additionally, he submitted that the CPA did not give any consideration to setback in respect of the storeys above the seventh storey. It ought to have said how it exercised its discretion, if it had considered that point, he said. The PAT, he submitted, had wrongly concluded that the CPA had not erred in law in this respect.

GRAND COURT - CAYMAN ISLANDS

66. Mrs. Bothwell submitted that the CPA had followed the regulations in that the application met the minimum requirements as to setbacks. There is no need for a new application, she said, as Grandview was not contending "that the grant and conditions attached were so far removed from the original application so as to be referable to a different development".

67. Learned Queen's Counsel, Mr Asif, endorsed Mrs. Bothwell's submissions and added that there is no reason for the setback for a three-storey building to be different from that of a ten-storey. It is not irrational, he said, for there to be no difference. He differed from Mr. Timms' position that the taller the building, the greater should be the setback.

68. The PAT found that the intention of the legislature was "to require buildings over three storeys high to setback a total of 145' from the high water mark".

69. I agree with the interpretation put on the Regulation by the PAT. The words in an enactment are to be given their natural meaning. Regulation 8(10)(e) states that there shall be a minimum setback of one hundred and thirty (130) feet from the high water mark, with an additional setback for the third through to the seventh storey. Those words are plain and simple. They mean a setback of one hundred and forty-five feet for a building up to seven storeys. However, this is a building of ten storeys, not seven. I reject the idea that there is no need for the contemplation of setback beyond seven storeys. The limitation in the regulation to seven storeys means, in my view, that the CPA is restricted to dealing with a building of seven storeys. This is so until there is an amendment that provides for what is to happen in the case of buildings over seven storeys.

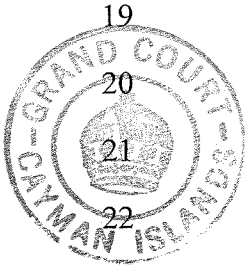
GRAND COURT CAYMAN ISLANDS

70. There cannot be an "anything goes" attitude in relation to buildings over seven storeys; especially when one considers the purpose of setbacks as stated in the Development Plan along with the matters stated in Regulation 8(11).

71. There is another aspect of concern that stems from my considerations in relation to the treatment of setbacks.

The proposed development calls for two sets of apartments on the lot. The Department of Planning shares the view of all the objectors that the ten-storey building is not in keeping with the character of the other buildings in the area whereas the four-storey building is. The Department of Planning also referred to the drawings as depicting a rather architecturally bland building.

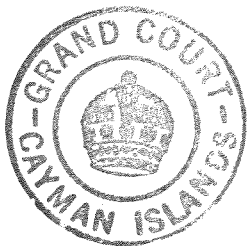
Given those observations from the Department of Planning, although the CPA is entitled to differ from the objectors and all others, one would expect that the CPA would not only give its reasons for applying minimum setbacks to a project of this size, but also for approving a building that is apparently generally regarded as ugly and out of character with those around.



In particular, the CPA ought to have stated how it dealt with the question of setbacks in respect of the eighth, ninth and tenth storeys, if it dealt with it at all.

I am not saying that the CPA is obliged to give reasons for all its decisions. Indeed, there is no requirement in the legislation for this to be done. In the instant case, it may well have very good reasons for its decision.

However, given the intensity of the objections and the obviously informed comments of the Department of Planning, the CPA ought to have stated its reasons in respect of the aspects that I have just mentioned. It is incorrect for the PAT to say that adequate reasons were given. It is noted that the PAT added that there was need for improvement generally in this regard. In my view, the PAT ought to have found that the CPA did not do what they should have done in this situation. The PAT erred in this regard.



CONCLUSION

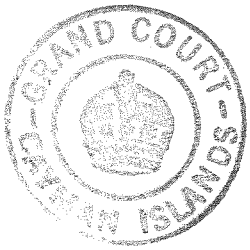
72. I am of the opinion that the PAT erred in not finding that the CPA erred in respect of its approach to the setbacks and in respect of its failure to give reasons on the matters mentioned in the preceding paragraph. I find that there has been an error of law in the CPA's approach to the question of setbacks, and that the decision on the face of it, is at variance with the Development Plan. The failure to give reasons in these circumstances amounts to an error of law also.

73. In the circumstances, the appeal is allowed, the judgment of the PAT is reversed and the application for planning permission is refused. I will entertain submissions in respect of costs.

74. Given what I have said about the nature of this appeal in paragraph 17 above, it follows that it is not appropriate to grant the relief sought by the Appellant's summons dated 8 April 2015 seeking permission to adduce additional evidence and for the court to have a site view. Therefore, the Appellant's summons is dismissed.

75. I wish to place on record my appreciation for the helpful detailed written submissions and the very spirited oral arguments of both learned Queen's Counsel and Junior Counsel in this matter. Your industry was obvious.

Dated this the 8th day of April 2016



Mr. Justice Seymour Panton
Acting Judge of the Grand Court