IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO. 101/99

C.J.

13-09-00

**BETWEEN:** **CORTINA INTERNATIONAL LTD.** **APPELLANT**
**(t/a "Cortina Villas")**

**AND:** **(1) THE PLANNING APPEAL TRIBUNAL**
**(2) THE CENTRAL PLANNING AUTHORITY**
**RESPONDENT**

Ms. Sheridan Brooks, for the Appellant
Mr. Samuel Bulgin, Solicitor General for the Planning Appeals Tribunal & The Central Planning Authority
Mr. Norman Klein for the Intervenors

Dates of hearing: August 30, 31 and September 1, 2000

BEFORE SANDERSON, J.

## REASONS FOR JUDGMENT

Cortina International Limited (Cortina) owns five acres of land in the Governors Harbour area and wanted to develop this property by constructing an apartment complex. The proposed development was estimated to cost approximately $7 million and on April 17th, 1997, Cortina filed an application to the Central Planning Authority ("Authority") for permission to construct the apartments. That application was denied and Cortina appealed that decision to the Planning Appeals Tribunal ("Tribunal"). The appeal was dismissed and Cortina has appealed that decision to the Grand Court. Cortina alleges that the decision of the Authority was unreasonable, was

made contrary to the principles of natural justice and that the discretion it exercised was not authorized by the legislation.

Cortina's initial application was for permission to construct 65 apartments. The application was prepared and presented by Cortina's architects, (Chalmers, Gibbs, Martin & Joseph) and contained architectural drawings and specifications for the proposed apartment complex. The other property owners in the vicinity were given written notice of the proposed development and told that they could inspect the application materials at the Planning Department office. The Director of Planning also gave written notice of the application to other government officials and departments and asked them to provide recommendations within two weeks. The Authority received 18 letters of objection, including one from the Governors Harbour Home Owners Association. The concerns were as follows:

- scale, mass, and density of the proposal
- suitability of the area for this size of development
- noise
- impact upon land values
- capability of roads to accommodate this proposal

Copies of many, but not all, of the letters of objection were forwarded to Cortina prior to the hearing and apparently some were filed the day of the hearing. One letter in support of the proposal was received. The reports from the Chief Fire Officer, Public Works Department and Registrar of Lands were also received and sent to Cortina prior to the hearing.

After receipt of these reports and letters of objection, Cortina prepared a revised application and

drawings which it presented on May 21st, 1997, the day of the Authority's hearing. The changes to the proposal were summarised in the May 21st, 1997 letter as follows:

> "Please find attached revised drawings for the above-noted development. The revised scheme has been developed in response to many comments received while consulting the community regarding the form of the development. The following changes have been incorporated:
> - centralised garbage collection
> - no. of units - reduced to 60 from 65.
> - no. of bedrooms - increased from 130 to 136 (due to 3 bedroom unit type
> - site coverage - reduced to 19% from 21%
> - total area - reduced to 97,518 s.f. from 103,756 s.f.
> - reduction in number walkways to increase outer ring of soft landscaping
> - addition of landscape trellis/pergola structures on and adjacent to buildings
> - variation in external roofline of units; no adjacent units will be the same colour.
> - parking - increased 145 spaces from 122 spaces
>
> If you require more information for your processing of this application, please do not hesitate to contact our office."

The hearing by the Authority was held on May 21st, 1997. The Minutes of that meeting reflect the comments received from the Chief Fire Officer, Chief Engineer of the Public Works Department and Registrar of Lands as well as several prior letters of objection. The minutes also referred to the Planning Department review which generally indicated that the proposed development complied with the requirements of Section 8(8) of the Development and Planning Regulations (1995 Revision), which provided:

> "8(8) In low density areas, detached and semi-detached houses and, in suitable locations, guest houses and apartments are permissible provided-
>
> (a) the maximum density is three detached or semi-detached houses or two three-bedroom duplexes per acre;
> (b) the maximum density for guest houses is sixteen bedrooms per acre;

(c) the maximum number of apartments is fifteen per acre with a maximum of twenty-four bedrooms;
(d) the minimum lot size for detached and semi-detached houses is 12,500 square feet and 11,600 square feet respectively;
(e) the minimum lot size for duplexes is 13,500 square feet
(f) the minimum lot size for guest houses and apartments is 25,000 square feet;
(g) the minimum lot width for detached and semi-detached houses and duplexes is 80 feet and for guest houses and apartments is 100 feet;
(h) the maximum site coverage for detached and semi-detached houses, duplexes, guest houses and apartments is twenty-five per cent of the lost size;
(i) the minimum front and rear setbacks are 20 feet;
(j) the minimum side set back is 10 feet for a building of one storey and 15 feet or fifty per cent of the height of the building, whichever is the greater, for a building of more than one storey,and
(k) no building shall be more than 3 storeys in height and shall, where it is 3 storeys in height, be so designed that no continuos vertical facade or elevation exceeds 2 storeys or 25 feet in height."

The Planing Department review appears, however, to have been prepared on the basis of the original application and not on the revised application May 21st, 1997 (which had addressed some of the concerns of the Planning Department).

Ms. Brooks submitted that, when the comments of the Planning Department are examined and the amendments to the proposal are considered, there is only one criticism of the original proposal that has not been satisfied . That criticism was:

Scale and Massing

"The mass of each individual structure or block is in keeping with or similar to the existing four plexes in Governors Harbour (i.e. Castaways condominiums). It is the scale of the proposal that appears to be excessive."

Seventeen individuals, including 9 objectors who had previously written letters and Arek Josephs, a representative of Cortina, attended the hearing of the Authority on May 21st, 1997. Arek Josephs

outlined the revised proposal, highlighted the project attributes and provided a copy of the revised site plan. The revised proposal described the changes previously referred to, including the reduction from 65 units to 60 units.

Eleven objectors spoke against the revised proposal and 2 supporters spoke in its favour. Mr. Joseph responded to the expressed concerns. The Chairman of the Authority stated that it was up to the Authority to determine whether the area was suitable for apartments. The Authority refused permission to construct the apartment complex and gave its reasons as follows:

"Cortina Villas
c/o P.O. Box 644
George Town
Grand Cayman

Dear Sirs:

Subject: Proposal Sixty-Five (65) Unit Apartment Complex Consisting of Sixteen (16) Buildings (each with four (4) Two (2) Bedroom Apartments and a den) a Managers Suite, Office and Swimming Pool on Block 11C Parcel 181 (266/91) (A.M.C.)

At a meeting held on May 21, 1997 your application was considered and it was resolved to refuse the application for the following reasons:

1. The proposal number of apartments is too excessive and would negatively impact the existing neighborhood, which predominantly consist of single family dwellings.

2. The Central Planning Authority is of the opinion that the number of vehicles associated with a finished development would overload the adjacent roads and affect the safety of residents.

3. The proposal scale of development is not in keeping with the existing developments on adjacent lots. The proposal in its entirety would dwarf existing development.

4. The proposal is not in keeping with the Planning Department's Apartment study of the Governors Harbour area. Although the study has yet to be adopted by the Central Planning Authority, the proposal would not satisfy any of the recommended options.

5. The mass and scale of the development is not acceptable to the Central Planning Authority. Although there are apartments on the subject quay, they are essentially small self-contained four plexes.

This proposal does not conform with that type of development and would dramatically alter the character of the area. ...

The Authority wishes to thank you for appearing at its meeting.

Yours faithfully,
James W. Corcoran
Director of Planning"

Cortina appealed this decision to the Planning Appeal Tribunal pursuant to section 43 (1) of Planning and Development Law (1995 Revision), which provides:

"43. (1) Any person aggrieved by a decision of the Authority may, within ten days after receipt of notification of such decision (or within such longer period as the Tribunal may in any particular case allow for good cause), appeal by way of rehearing to the Tribunal against such decision on the ground that -

(a) it is erroneous in law;
(b) it is unreasonable;
(c) it is contrary to the principles of natural justice; or
(d) it is at variance with a development plan having effect in relation thereto,

but not otherwise.

(2) On any such appeal the Tribunal may make such order (including any order for costs) as it thinks just."

That appeal was dismissed by the Tribunal on January 29th, 1999. Cortina has appealed that decision to the Grand Court, pursuant to Section 43(4) of the Planning and Development Law (1995 Revision) which provides;

"(4) Any person aggrieved by a decision of the Tribunal under subsection (2) may, within fourteen days, appeal there against to the Grand Court."

The Notice of Appeal sets out 22 grounds. Many of those grounds were duplications. During the course of her submissions Cortina's counsel, Ms. Brooks, put forward 3 separate grounds of appeal. They were;

1. That no reasonable tribunal could come to such a conclusion on this evidence and the Authority considered evidence which it ought not to have considered and failed to consider evidence that it was required to consider. She relied upon Ebanks vs Central Planning Authority (1980-1983) CILR 207, Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation (1948) 1 KB 223 at page 233-234; and Cayman Flying Association vs Central Planning Authority –Unreported – 12th April, 2000.
2. That Cortina was not given a fair hearing in accordance with the principles of natural justice because;
    (a) the Authority relied upon the Governor's Harbour Study Area, Apartment Policy Paper and further letters of objection, without giving Cortina the opportunity of responding to those documents;
    (b) That the Authority gave Cortina a legitimate expectation that the approval would be granted; and
    (c) the Authority did not give Cortina any notice that it was going to make a final determination without given them a further opportunity to deal with objections.

In support of the these arguments Ms. Brooks referred to ;

Attorney General of Hong Kong vs Ng Yuen Shiu (1983) 2 AER 346

R vs Secretary of State of State for the Home Department ex p Hargraves [1997] 1 WLR 906

Ridge vs Baldwin (1964) AC 40

Karamanian v. Richmond [1982] 138 D.L.R. (3d) 760 (B.C.S.C.)

Re City of Penticton et al and British Columbia Energy Commission

1979 96 D.L.R. (3d) page345 .

3. That the Authority did not have any discretion to refuse the application once it was satisfied that the requirement of Section 8 (8) of the Development and Planning Regulations(1995 Revisions) had been complied with. She relied upon the changes contained in the Planning and Development Regulations (1998) and the decision in Julius vs Lord Bishop of Oxford (1874) AER 43.

Cortina submits that the above errors were made by the Central Planning Authority and were all raised as grounds of appeal before the Planning Appeals Tribunal. Since the Tribunal dismissed the appeal, Cortina agrues that it has, therefore, committed the same legal errors and has appealed on that basis.

THE LEGAL BASIS OF THE APPEAL

This is an appeal that is brought pursuant to section 43 of the Development and Planning Law (1995 Revision.) and Order 55 of the Grand Court Rules. It is not an application for judicial review. I must first determine what are the correct legal tests to employ.

Section 43(1) describes the 4 grounds of appeal that may advanced on a rehearing to the Tribunal. They are; (a) error of law (b) unreasonableness (c) a decision contrary to principles of natural justice and (d) a decision at variance with a development plan. No other are available. The first 3 grounds are also generally recognized as reasons to set aside decisions of administrative tribunals upon judicial review and, therefore, principles developed in the public law arena of judicial review apply to them.

Although the Tribunal is entitled to hold a rehearing, it is limited to an examination and consideration of the evidence and arguments relating to the 4 grounds enumerated in sec. 43(1). It cannot have a rehearing at large or substitute its views on the merits for those of the Authority.

The decision of the Tribunal may be appealed to this Court pursuant to section 43 (4) of the Development and Planning Law. The scope and procedure for such an appeal are contained in Order 55 of the Grand Court Rules which provides;

> 0.55, r.1
>
> "(1) Subject to paragraph (2) and (3), this Order shall apply to every appeal which by or under any enactment lies to the Court from the Governor-in-Council, the Registrar of Lands, any tribunal or person."
>
> (3) The following rules of this Order shall, in relation to an appeal to which this Order applies, have effect subject to any provision made in relation to that appeal by any other provision of these Rules or by or under any enactment.
>
> 0.55, r.3
>
> (1) An appeal to which this Order applies shall be by way of rehearing and must be brought by originating motion.
>
> 0.55,r.7
>
> (1) In addition to the power conferred by rule 6(2), the Court when hearing an appeal to which this Order applies shall have

the powers conferred by the following provisions of this rule

(2) The Court shall have power to receive further evidence on questions of fact, and the evidence may be given in such manner as the Court may direct either by oral examination in Court, by affidavit, by deposition taken before an examiner or in some other manner.

(3) The Court shall have powers to draw any inference of fact which might have been drawn in the proceedings out of which the appeal arose.

(4) It shall be the duty of the appellant to apply to the person presiding at the proceedings in which the decision appealed against was given for a signed copy of any note made by him of the proceedings and to furnish that copy for the use of the Court; and in default of production of such note, or, if such note is incomplete, in addition to such note, the Court may hear and determine the appeal on any other evidence or statement of what occurred in those proceedings as appears to the Court to be sufficient .

Except where the Court otherwise directs, an affidavit or note by a person present at the proceedings shall not be used in evidence under this paragraph unless it was previously submitted to the person presiding at the proceedings for his comments.

(5) The court may give any judgment or decision or make any order which ought to have been given or made by the Governor-in-Council, the Registrar of Lands, tribunal or other person and make such further or other order as the case may require or may remit the matter with the opinion of the Court for rehearing and determination by it or him.

(6) The Court may, in special circumstances, order that such security shall be given for the costs of the appeal as may be just.

(7) The Court shall not be bound to allow the appeal on the ground merely of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned.

Order 55 allows this Court to have a rehearing and accept further evidence. The Court is however hearing an appeal from the decision of the Tribunal. The Tribunal must base its decision on considerations and evidence that fall within the 4 limited grounds of appeal set out in sec. 43(1). This Court must confine its review to whether or not the Tribunal erred in upholding the Authority's decision. It must, therefore, confine its review to considerations and evidence that fall within the 4 grounds of appeal set out in sec. 43(1). In other words, The Grand Court's powers on appeal are no greater than those of the Tribunal.

## I REASONABLENESS OF DECISION

This Court has jurisdiction to set aside the decision of an inferior tribunal if it has failed to consider the proper evidence or is patently unreasonable. Lord Green M.R., put it this way in Associated Provincial Picture Houses Ltd vs Wednesbury Corporation (1948) 1 KB 223 at page 233-234.

> " In the result, this appeal must be dismissed. I do not wish to repeat myself but I will summarize once again the principle applicable. The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, adversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere, The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them. The appeal must be dismissed with costs."

This Court in Ebanks vs Central Planning Authority (1980-1983) CILR 207 held at p. 212;



> "The appellant's appeal was heard by the tribunal on January 21st, 1982 and February 17th and 25th, 1982. The Tribunal itself visited the proposed site on February 17th. The appeal took the form of a rehearing of the matter and the evidence of six witnesses, including the appellant himself, was heard. With the preponderance of the evidence before that board in favour of the appellant's project, one finds it difficult to comprehend the decision arrived at by the tribunal that "the appeal is disallowed."

Cortina's counsel made several submissions in support of her argument that the decision was "not reasonable". She said;

1. it was not clear whether the Authority was considering the revised application for 60 units or the initial application for 65 units. The letters dated June 20th, 1997, that were sent to the objectors after the conclusion of the hearing contained a heading that referred to a 65 unit development instead of a 60 unit development;

2. that if the Authority was basing its decision on the revised application (60 units), it should not have relied upon the objections that were made to the original application (65 units);

3. the Authority must give greater weight to the position taken by the Planning Department than by the various individual objectors. She argued that the Planning Department had only one objection (the mass and scale of the proposal) and that since it had the "expertise" and was "independent" its views should be given far more weight than those of the objectors who had no factual basis or expertise for making the assertions they did. She submitted that not one of the government agencies recommended against the proposal and that the arguments of the objectors should be given little or no

weight.

The Solicitor General, Mr. Bulgin, appeared for the Tribunal. On the question of reasonableness he submitted;

1. that the Authority is entitled and bound to have considerations of a planning nature and that all considerations relating to the use and development of land may be regarded as planning considerations (Stringer v. Minister of Housing and Local Government and Another (1970) W.L.R. 1281);

2. that the Authority must consider locale generally and not just individual plots of land (Poundstretcher Ltd. v. Secretary of State for the Environment and Liverpool City Council (1989) JPL 90);

3. that it was not necessarily unreasonable to deny approval even though the requirements of the Regulations had been met (Jacques Scott and Companies Limited v Moxam and Liquor Licensing Board 1998 CILR 323); and

4. the Court must not substitute its view on the merits. The weight to be given to competing considerations is entirely for the Board (Stringer v Minister of Housing and Local Government and Another (1970) W.L.R. 1281).

In addition to the authorities referred to I am guided by and adopt the following passages from Judicial Review of Administrative Action, 5th Edition, De Smith, Woolf & Jowell at p. 557 and 558:

> "When the courts review a decision they are careful not readily to interfere with the balancing of considerations which are relevant to the power that is exercised by an authority. The balancing and weighing of relevant considerations is primarily a matter for the public authority and not for the

courts. Courts have, however, been willing to strike down as unreasonable decisions where manisfestly excessive or manifestly inadequate weight has been accorded to a relevant consideration.

For example, a local authority, or the Secretary of State on appeal, may, in considering whether to grant a permission for the change of use of a building, have regard not only to the proposed new use but also to the existing use of the building and weigh the one against the other. The courts are concerned normally to leave the balancing of these considerations to the planning authority. However, where the refusal of planning permission is based on the preference for the preservation of the building's existing use, the refusal may be struck down in the extreme case where there is in practice "no reasonable prospect" of that use being preserved. In effect, in such a case the courts are holding that the existing use is being accorded excessive weight in the balancing exercise involved. The courts have also interfered with the balancing of "material" planning considerations, by holding that excessive weight had been accorded to a planning permission that had long since expired. Although planning authorities are required, in deciding whether to grant or refuse planning permission, to have regard to government circulars, or to development plans, a "slavish" adherence to those (relevant and material) considerations may render a decision invalid."

In this case, Cortina has not persuaded me that the decision of the Authority is unreasonable. There was no compelling evidence that the Authority was considering the original application rather than the amended application. Rather I am persuaded on the whole of the evidence that the Authority considered the amended application. The amended application was delivered in writing and was clearly before the Authority. At the commencement of the hearing, Cortina indicated that it was proceeding with an application to build 60 apartments and its architect presented to the Authority the outline and benefits of the amended application. The subsequent letters which contain a heading that refers to a 65 unit application are most likely a typographical error and do not themselves, provide a reason for setting aside the Authority's decision on the basis of unreasonableness.

I am satisfied, that even though the Authority based it decision on the amended application, it was nevertheless entitled to consider whether the initial objections remained valid with respect to the amended application. It was entitled to examine the initial complaints and determine if they had an applicability to the revised application. It was a matter of what weight should be attached to the

initial objections, considering the changes that had been made in the amended application. If the Authority considered those changes to be minor then it could attach greater weight to the initial objections. It was also open to Cortina at the hearing, to point out the changes that had been made to its proposal and why those changes should satisfy the concerns of the objectors.

The weight to be given to the evidence that is properly before the Authority is to be determined by the Authority. Unless this Court concludes that the decision of the Authority was so unreasonable, that no reasonable Authority could ever have come to it, or that it took into account matters which it should not take into account or conversely that it failed to take into account matters which it ought to take into account, then it cannot properly be set aside.

The evidence before the Authority detailed the size and scope of the proposed development. There were many objectors who raised the concerns mentioned. Cortina was given the opportunity to and did respond to those concerns as it saw fit. It was open to and entirely proper for the Authority to consider the concerns expressed and to consider, from a planning perspective, the likely impact of the proposed development. It is not necessary that the Authority reject the evidence of the objectors in favour of the opinion of the Planning Department. I am satisfied that the decision of the Authority was not unreasonable.

II FAIR HEARING

Cortina says that it has been denied a fair hearing on the grounds previously outlined.

As stated by Tucker L.J. in Russell v Duke of Norfolk [1949] 1 All E.R. 109, 118;

> "There are in my view, no words which are of universal application in every kind of domestic tribunal... whatever standard is adopted, one

essential is that the person concerned should have a reasonable opportunity of presenting his case."

(a) Governors Harbour Study Area, Apartment Policy Paper

Cortina says that the Authority erred in relying on or referring to this study because it was not given any notice of it and was therefore not given the opportunity of responding to it or commenting upon it. De Smith, Woolf and Jowell in Judicial Review of Administrative Action, state;

"DUTY OF ADEQUATE DISCLOSURE

> If prejudicial allegations are to be made against a person, he must normally, as we have seen, be given particulars of them before the hearing so that he can prepare his answer. In order to protect his interests he must also be enabled to controvert, correct or comment on other evidence or information that may be relevant to the decision; indeed, at least in some circumstances there will be a duty on the decision maker to disclose information favourable to the applicant, as well as information prejudicial to his case. If material is available before the hearing, the right course will usually be to give him advance notification; but it cannot be said that there is a hard and fast rule on this matter, and sometimes natural justice will be held to be satisfied if the material is divulged at the hearing, which may have to be adjourned if he cannot fairly be expected to make his reply without time for consideration. In deciding whether fairness does or does not require an adjournment in order to allow further time to consider such material and to prepare representations, a court or other decision-maker should take into account the importance of the proceedings and the likely adverse consequences on the party seeking the adjournment; the risk that the applicant would be prejudiced; the risk of prejudice to any opponent if the adjournment were granted; the convenience of the Court and the interests of justice in ensuring the efficient despatch of business; and the extent to which the applicant has been responsible for the circumstances leading to the request for an adjournment .

Cortina was made aware that some of the objectors were relying on this report in support of their submissions. The letter of objection from Governors Harbour Home Owners Association had a heading which stated:

"1. Reference to Governors Harbour Study Area - Apartment Policy Paper."

This was followed by several paragraphs dealing with policy issues.

The second letter of objection from John and Sheila McKenzie stated;

> "Please also be advised that it is our opinion that this application should be denied until such time as the CPA determines a definite development policy on the Governor's Harbour Area based on resident inputs in response to the CPA's Apartment Policy Paper, studying future development for the area".

At the hearing before the Authority, Mr. Herbert, speaking on behalf of the Governors Harbour Home Owners Association, again referred to this policy statement. It was, therefore, known to Cortina that at least two objectors were relying on this policy statement. Cortina was given notice of this and the opportunity to respond. There is no evidence that it did so. It may have considered the reference to this policy as minor or insignificant or not one for which a reply was warranted, but it was given notice that certain objectors were going to rely on it and it was given an opportunity to respond. In these circumstances, there has been no breach of the duty to act fairly.

(b) Legitimate Expectation

Cortina next argues that it was given a legitimate expectation that the Authority would approve the application. Ms. Brooks submitted;

1. because the Department of Planning did not recommend rejection of the proposal; and

2. there is nothing from the Department of Planning report to indicate that Cortina had not complied with Regulation 8(8); and

3. a map, approved in 1985 (for one year only) indicated that apartments were permitted in this area;

that Cortina had a reasonable expectation that the approval would be granted. She relied upon the judgment in Attorney-General of Hong Kong vs. Ng Yuen Shiu (1983) 2 AER 346. That case is authority for the proposition that the public authority was bound by its undertakings as to the procedure it would follow, provided that those undertakings did not conflict with its statutory duty.

In the case at bar there was no undertaking that related to procedure it will follow. For the principle of legitimate expectation to arise, there must be a clear and unambiguous representation or undertaking (R v. Jockey Club, ex parte RAM Racecourses Ltd. (1993) 2 ALL ER 225.) In the case at bar there was no clear and unambiguous representation that the approval would be granted. In Judicial Review of Administrative Action (supra) at p. 421, it states

> "The terms of the representation by the decision-maker (whether express or implied from past practice) must entitle the party to whom it is addressed to expect, legitimately, one of two things:
>
> (1) that a hearing or other appropriate procedure will be afforded before the decision is made; or
> (2) that a benefit of a substantive nature will be granted or, if the person is already in receipt of the benefit, that it will be continued and not be substantially varied.
>
> In the first case, fairness dictates that the expectation of a *hearing* be fulfilled. The expectation may extend to the opportunity to make representations or to any other component part of a fair hearing, for example, the duty to give reasons. In the second case, fairness dictates that the expectation of the *benefit* should not be summarily disappointed and that the recipient of the benefit should at least be permitted to argue for its fulfilment".

Cortina was accorded a hearing and the opportunity to make submissions, which it exercised. Whatever its expectations as to the result may have been, they did not flow from any undertaking or promise by the Authority and are not matters of procedure. The essential components of a legitimate expectation are met.

(c) Notice of Intention to Make a Final Decision

Ms. Brooks submitted that Cortina was denied a fair hearing because it was unaware that the Authority was going to make a final decision. She says Cortina was under the impression that it would be given time to deal with the objections. There is no evidence before me which supports these assertions. There is a document which was apparently completed by the Planning Department and submitted to the Authority which is described as "check list for site inspections". After that heading the word "discussion" has been circled. From this Ms. Brooks argues that the Authority was required to discuss the matter and should not have come to a final decision without first giving Cortina notice of its intention to do so. However, there was no evidence that this document was received or relied upon by Cortina.

It is clear from the language of Section 12 (1) and (2) the Development and Planning Law (1995 Revision) that the Authority is to grant or refuse permission. It provides;

> "(1) Subject to this section and section 5(1), where application is made to the Authority for outline planning or permission to develop land, the Authority may grant permission either unconditionally or subject such conditions as it thinks fit, or may refuse permission".

This was the section under which Cortina applied for approval. The notices that were sent to the adjoining property owners made it clear that it was an application for permission to develop land. On the evidence before me, Cortina must have known that the Authority would be making its final decision. There is no contrary suggestion contained in the minutes of the hearing. The Authority did not say or do anything that could lead Cortina to any conclusion other than that it would grant or refuse permission.

III DISCRETION:

Cortina says that the Authority did not have the discretion to refuse the application once there was a determination that the location was suitable for apartments and that the requirements of sec. 8(8) had been satisfied. Ms. Brooks said that in 1985 there had been a determination that the site was suitable for apartments and she refers to a map that was stamped by the appropriate Government official. That stamp said "approved" . It was valid for one year only. The map indicates that the subject area was designated for apartments. No other document was produced showing that the map was changed. It is clear on its face, however, that the approval was granted for 1 year only. This is consistent with sec. 12(4) of the Development and Planning Law (1995 Revision) which provides that even when an approval to develop is granted it remains effective for 1 year only.

The evidence does not support a conclusion that the Authority determined in 1997 that the subject Land was suitable for apartments, although it had been zoned for uses which included apartments. In any event, the Authority did not base its decision on the ground that this site was not suitable for

apartments. It concluded that this proposed development was not suitable for this site in all of the circumstances.

That is, even if the Authority had made a determination that a site was suitable for apartments is it still permissible for the Authority to exercise a discretion in determining if a particular proposal is acceptable. Ms. Brooks argued that the Regulations that were in effect in 1997 did not allow the Authority the discretion to make that determination. She says that the Regulations were amended subsequent to the Authority's decision and those amendments conferred the discretion upon the Authority that it did not previously have. She says that the 1997 amendments demonstrate that the legislators recognized there was no discretion granted and passed the amendments to create it. She relies primarily on the amendments to the Development and Planning Regulations (1995 Revision) Regulation 8. The 1995 Regulation states;

> "8(1) In the residential zone the primary uses are residential and horticultural.

The amended Regulation passed in 1997 (after the Authority's decision) state;

> "8. (1) In a residential zone the primary uses are residential and horticultural. Applicants for permission to effect any development in a Residential zone shall ensure that the massing, scale proportion and design of such development is consistent with the historic architectural traditions of the Islands.
>
> (2) In determining whether applicants have satisfied the requirements of subregulation (1), the Authority shall have regard, among other things, to-
>
> (a) the compatibility of any building with the landform;
> (b) the use of embellishments and features which distinguish local architecture;
> (c) whether the balance and proportions of any buildings are those of traditional building forms;



(d) the use of traditional stone walls, picket fences, hedging and roadside plantings;
(e) the use of colorful tropical vegetation; and
(f) presence of natural vegetation, beaches, coves or on shore or sea views

(9) Subject to subregulations (6),(7) and (8), the maximum height of guest houses and apartments in a Residential zone shall be at the discretion of the Authority in accordance with the scale and character of buildings in the area."

Section 8(2),(9) and the second sentence of section 8(1) were added in 1997. She argues that these amendments grant a discretion to consider these matters and they would not be required or added if the Authority already had that discretion under the 1995 Regulations. She says they demonstrate an intention to create a discretion which did not exist before.

The important legislation to consider is section 12 of the Development and Planning Law (1995 Revision), which has not been amended. It confers upon the Authority, in clear terms, the discretion to grant or refuse permission to develop land. It says the Authority may grant or may refuse permission as it sees fit. Many other sections of this legislation use the word "shall" demonstrating recognition that the word "may" confers a discretion upon the Authority while the word "shall" does not.

The effect of the amendments is the opposite of what Cortina suggests. Section 12 of the Development and Planning Law (1995 Revision) makes it clear that the Authority's decision to grant or refuse permission is discretionary. That discretion was narrowed somewhat by the 1997 amendments to the Regulations. Those amendments requires that the Authority shall have regard to the matters enumerated. That is, the Authority must consider them when exercising its discretion. Apart from those mandatory requirements, the discretion granted by sec. 12 remained unchanged.

The appeal is dismissed with costs.

Dated this 13th day of September, 2000.

Dale Sanderson
Judge of the Grand Court