

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CIVIL DIVISION

3
4 Cause No: G0244/2014
5

6 IN THE MATTER OF THE DEVELOPMENT AND PLANNING LAW (2011 REVISION)
7 AND IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE
8 PLANNING APPEALS TRIBUNAL IN RESPECT OF BLOCK 13B PARCEL 202
9

10 BETWEEN:

GRAND VIEW STRATA CORPORATION

11
12
13 APPELLANT
14

15 AND:

- 16 1. THE PLANNING APPEALS TRIBUNAL
17 (PAT)
18 2. BRONTE DEVELOPMENT LTD.
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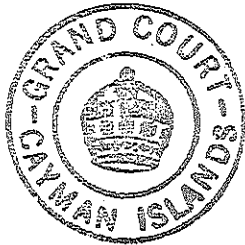
20 RESPONDENTS
21
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23 Appearances:

Mr. Neil Timms Q.C. for Grand View

24
25 Mrs. Suzanne Bothwell and Mrs. Marilyn
26 Brandt of the Attorney General's Chambers
27 for the Planning Appeals Tribunal
28

29 Mr. Jalil Asif Q.C. and Ms. Philippa
30 McFarlane of Kobre & Kim of Bronte
31 Development
32



33 Before:

Mr. Justice Seymour Panton

34 Heard:

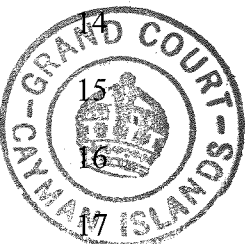
21st, 22nd, 29th and 30th September 2015
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36 JUDGMENT
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1 1. On 5 December 2014, the Planning Appeal Tribunal (PAT) handed down its reasons
2 for dismissing the appeals of Grandview Strata Corporation (Grandview) and two other
3 parties against the decision of the Central Planning Authority (CPA) to grant
4 permission to Bronte Development Ltd (“Bronte”) to construct two sets of apartments
5 on land at Snooze Lane, George Town Grand Cayman. By an amended notice of
6 originating motion, dated 19 December 2014, Grandview filed an appeal against the
7 decision of the PAT. This judgment deals with Grandview’s latter appeal.

8
9 2. Grandview is seeking a reversal of the decision of the PAT, and that the “planning¹
10 permission” granted to Bronte be also reversed and refused.

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

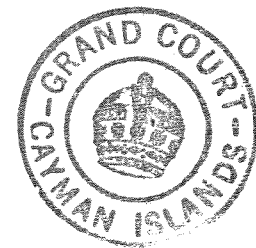


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19 4. There were several objections by property owners, and there were also comments and
20 recommendations by the various agencies. In the end, the CPA granted the application
21 subject to certain stated conditions.

22
23 5. The grounds of appeal that were dealt with by the PAT are similar, in substance, to the
24 grounds that were argued, with much force, and at great length, by the Appellant
25 before me. I find it convenient at this stage to summarize what I regard as the main
26 points in the judgment of the PAT. They are as follows:

¹ The CPA’s permission

- 1 i. The PAT's jurisdiction is limited to adjudicating on decisions made by the CPA on
2 matters that fall within the ambit of the four grounds set out in s.48(1) of the
3 Development and Planning Law. There is no power to conduct a "de novo"
4 hearing;
- 5
6 ii. The regulations indicate an intention on the part of the legislature to require
7 buildings over three storeys high to have a setback of a total of 145 feet from the
8 high water mark;
- 9
10 iii. The regulations provide for a minimum restriction of 20 feet for side setbacks
11 (with a discretion to increase);
- 12
13 iv. The CPA acted appropriately in exercising its discretion to vary the setback so that
14 the pool on the existing plans is in alignment with the adjacent property;
- 15
16 v. The weight of the comments and recommendations from the various government
17 agencies including those from the Department of the Environment was properly
18 assessed by the CPA;
- 19
20 vi. The CPA fulfilled the requirements of the Law as regards notifying all concerned
21 of the application by Bronte, and there was no breach of the principles of natural
22 justice;
- 23
24 vii. The reasons provided by the CPA were adequate, although there is "the need for
25 improvement generally";
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viii. The Development Plan² 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.

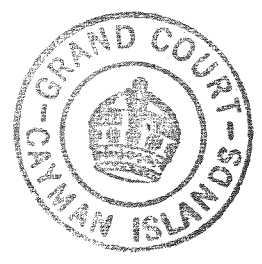
6. The Appellant is challenging the decision of the PAT on grounds which were filed with the Clerk of the Courts on 22 December 2014 and which I also now summarize:

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 Plan³;

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;

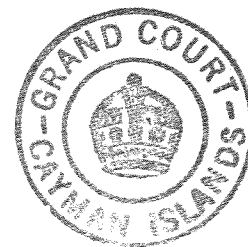
² See paragraph 12 of this Judgment
³ The Development Plan (see paragraph 12 of this Judgment)



- 1 iv. The PAT failed to consider and determine that the CPA erred in law in applying
2 the wrong test to determine the planning application;
- 3
4 v. The PAT failed to consider and determine that the CPA erred in its understanding
5 of Regulations 8(10)(e) and 10(1)(f) in relation to setbacks and side setbacks;
6
- 7 vi. There was procedural unfairness on the part of the CPA; and
8
- 9 vii. The PAT failed to consider and determine that the CPA erred in law and/or
10 unreasonably failed to take into account or evaluate the impact of the development
11 on tourism.

12
13 7. Before dealing with the submissions made by the respective parties, I think it
14 appropriate to mention the law and regulations that are relevant for consideration in the
15 determination of applications for planning permission in the Cayman Islands.

16
17 The foremost piece of legislation that applies to this application is the Development
18 and Planning Law (2011 Revision) (“the Law”). It establishes the CPA and provides a
19 framework for the CPA’s consideration of applications for permission to carry out
20 developments. The Law at s.6 states that the CPA shall:



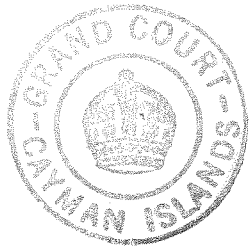
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- “(a) consider the likely impact of the proposed development on the infrastructure of the Islands as well as on the educational, social, medical and other aspects of life in the Islands;
- (b) consider whether there are other issues of national importance 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 CPA⁴.

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 Law⁵.



⁴ S.7 of the Development and Planning Law (2011 Revision) (“the Law”)
⁵ S.4 of the Law

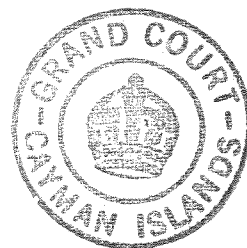
1 10. Section 13(1) of the Law provides that, except where otherwise provided for by the
2 Law, permission to develop land shall not be given which would result in development
3 that is at variance with a Development Plan. And s.15(1) authorizes the CPA to grant
4 permission either unconditionally, or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

6
7 11. The relevant regulations for the purpose of this appeal are the Development and
8 Planning Regulations (2013 Revision) (hereinafter referred to as “the Regulations”),
9 with particular reference to Regulations 5, 8 and 10 thereof.

10
11 Regulation 5 provides that the control of development shall be in accordance with
12 these Regulations and the Development Plan, but the CPA may give permission for
13 development deviating from the Regulations so long as it is in keeping with the
14 Development Plan.

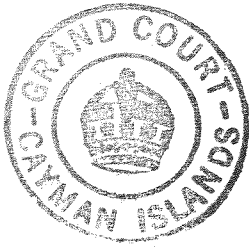
15
16 Regulation 8 deals with parking, height of buildings, setbacks and the giving of notices
17 to neighbouring owners.

18
19 Regulation 10 deals specifically with hotel/tourism related development. It reads thus,
20 in part:



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

- 4 (a) The maximum number of bedrooms for hotels is sixty-five per
5 acre;
6 (b) The maximum number of apartments is twenty-five per acre;
7 (c) The minimum lot size for hotels and apartments is half an acre
8 with a minimum lot width of 100 feet;
9 (d) The minimum lot size for residential development within a
10 hotel zone is 12,500 square feet and the minimum lot width
11 100 feet;
12 (e) The maximum site coverage for hotels and apartments is forty
13 per cent of the lot size;
14 (f) The minimum side setbacks are a minimum of 20 feet;
15 (g) The minimum rear setbacks are 25 feet from the road edge or
16 lot boundary as the case may be; and
17 (h) In the case of a cottage colony development-
18 i. The maximum number of cottage units is ten per acre;
19 ii. No cottage unit contains more than two bedrooms;
20 and
21 iii. The maximum site coverage is twenty-five per cent of
22 the lot size.”
23



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

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

31 The primary objective, according to the Development Plan, is to:
32

33 *“...maintain and enhance the Cayman Islands and the well-being and prosperity of
34 its people subject thereto its environmental character”.*

35
36 The Development Plan states that there is an intention to develop a planning strategy
37 which is flexible enough in concept and implication to accommodate individual
38 requirements, special circumstances as well as changing conditions. There is the
39 requirement for the striking of a “careful balance” “between what is a valuable natural
40 feature and a desirable development”.
41

1 13. The Development Plan also contains the following statement:

2 *“The provisions for development setbacks are for achieving the following*
3 *purposes:*

- 4 *(a) To provide adequate natural light, ventilation and privacy to all buildings;*
- 5 *(b) To provide amenity space and to facilitate landscaping around buildings;*
- 6 *(c) To maintain and enhance the quality and character of development*
7 *fronting a road;*
- 8 *(d) To provide a buffer between buildings on neighbouring lots; and*
- 9 *(e) To avoid or minimize any negative impact the development or use of one*
10 *lot may have on the occupants of a neighbouring lot.”*
11

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

13 *“... will be carefully regulated to ensure that the needs of the tourist industry are*
14 *met and that new buildings will in general be related to the needs of the industry.”*
15

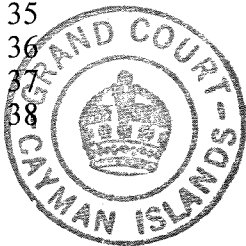
16 The Development Plan provides as follows:

17 *“The Authority shall apply the Hotel/Tourism Zone provisions and other relevant*
18 *provisions of this Statement in a manner best calculated to:*

- 19 *(a) Provide for the orderly development, expansion and upgrading of facilities*
20 *required to maintain a successful tourism industry;*
- 21 *(b) Ensure that all development enhances the quality and character of the Cayman*
22 *Islands’ hotels and cottage colonies;*
- 23 *(c) Prevent the over-development of sites and to ensure that the scale and density*
24 *of development are compatible with and sensitive to the physical*
25 *characteristics of the site;*
- 26 *(d) Ensure minimal traffic impacts on surrounding properties and existing public*
27 *roads;*
- 28 *(e) Ensure that waterfront developments are designed to avoid interference with*
29 *natural coastal processes; and*
- 30 *(f) Ensure adequate allowance for public access to the sea.”*
31

32 The Development Plan goes on to say:

33 *“The Authority shall take into consideration the characteristics of the form of*
34 *tourist accommodation proposed and shall be satisfied that the layout, scale and*
35 *massing of development are compatible with the ecological, aesthetics, and other*
36 *physical characteristics of the site; and that a high quality of design and*
37 *landscaping are used.”*
38

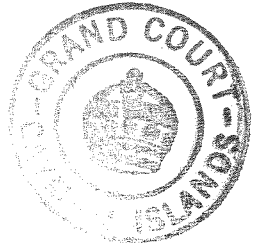


1 15. Given the conclusion that I have arrived at, I do not find it necessary to deal with each
2 and every ground of appeal in detail. I shall deal only with those points that I think are
3 important for the resolution of the appeal.

4
5 16. It became clear to me that the question of the fairness of the procedure was the main
6 topic of discourse by the appellant. The second most important aspect was whether the
7 Development Plan and the regulations had been complied with; and finally, there was
8 complaint made in respect of the alleged failure of the CPA to give reasons for its
9 decision.

10
11 17. Without going into the submissions, but with great regard for them, I wish to say at the
12 outset that I agree with the PAT's interpretation of its powers under s.48 of the Law as
13 regards rehearing. The words of the legislation are clear. An appeal to PAT is to be
14 considered on the basis of the printed record. If there is to be a rehearing in the sense of
15 calling witnesses, the PAT is empowered to direct the CPA to undertake such.

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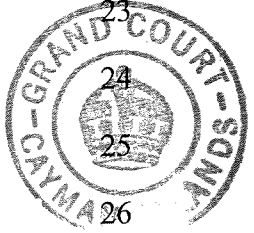


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ALLEGED PROCEDURAL UNFAIRNESS

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.

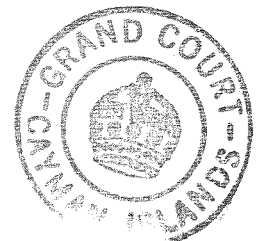


1 19. With regard to the comments of the various departments and agencies not being
2 “provided” to the objectors in advance of the hearing, Mr. Timms complained that this
3 was instead done when the minutes “were served”. In contrast, he said, it seems that
4 Bronte received all the material before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

6
7 20. In their submissions before me, however, counsel for Bronte said that the statement
8 relating to what Bronte had received from the CPA is incorrect. Counsel for Bronte
9 said Bronte did not receive the report of the Department of Environment until at the
10 hearing before the CPA, whereas it seemed that the objectors had been provided with it
11 earlier.

12
13 21. Mr Jalil Asif, QC, submitted that the Appellant’s contention in this regard
14 demonstrates a lack of understanding as to the “planning procedure”. The CPA, he
15 said, on receipt of an application, immediately engages in a process of consultation
16 with the applicant and the relevant government departments and agencies with a view
17 to identifying and addressing any concerns raised. After discussions and receipt of
18 comments, the plans submitted by the applicant may be revised as necessary. When the
19 developer’s plans have been finalized and submitted to the CPA, the application is then
20 listed for adjudication. Notices are then sent out to relevant parties within a certain
21 radius of the proposed development as required by the Law. They are given a period of
22 twenty-one (21) days to view the plans and a hearing date is set.

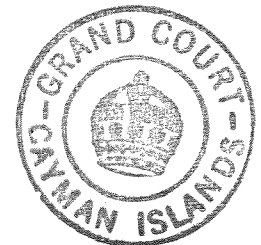
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1 The CPA does not distribute the correspondence between itself, the applicant and the
2 various agencies and departments. Mr. Asif submitted that that would be impractical
3 and inappropriate. In any event, the Law, he said, does not require that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

7
8 22. Mr Asif pointed out that some objectors and Mr. Timms were at the hearing, but they
9 made no objection or observation in relation to the instant complaint and, in addition,
10 there was no application for an adjournment.

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



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

3

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

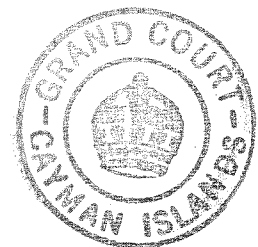
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9 26. The meeting of the CPA was duly held on 18 December 2013 commencing at 10:00
10 a.m. in the conference room on the first floor of the Government Administration
11 Building. It was the 27th meeting of the CPA for the year. There were fifteen members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

18

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

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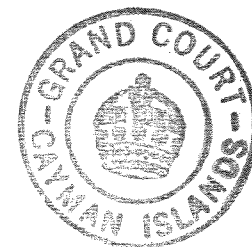


1 28. On this aspect of its complaints against the decision of the CPA, Grandview relied on
2 *R (Primary Health Investment Properties Ltd) v Secretary of State for Health*⁶, *In re*
3 *D. (Adoption Reports: Confidentiality)*⁷ and *Hadmor Productions Ltd v Hamilton*⁸.

4
5 29. The case *In re D. (Adoption Reports Confidentiality)* concerned an application by a
6 mother to inspect two sections of a report of the *guardian ad litem* that expressed in
7 detail the children's wishes and feelings towards their parents. The mother was
8 opposing an application by her former husband and his new wife for the adoption of
9 her two sons. None of the other parties to the proceedings, except the guardian ad
10 litem, had been privy to the relevant sections of the report. The judge refused the
11 application and the Court of Appeal dismissed the mother's appeal. However, the
12 House of Lords allowed the mother's appeal on the basis that the fundamental principle
13 of fairness that a party was entitled to the disclosure of all materials which might be
14 taken into account by the court when reaching an adverse decision applied with
15 particular force to adoption proceedings. Lord Mustill, in delivering the judgment, said
16 at page 614D:

17
18 *"...I am satisfied that the judge erred in giving no weight to the strong*
19 *presumption in favour of disclosure which, for the reasons given, I believe should*
20 *prevail in adoption proceedings. It is for this reason that I have concurred in the*
21 *order allowing the appeal."*
22
23

24 Earlier, His Lordship had reasoned thus:



⁶ [2009] EWHC 519 Admin

⁷ [1996] AC 593

⁸ [1983] 1 AC 191

1 “...it is a first principle of fairness that each party to a judicial process shall have
2 an opportunity to answer by evidence and argument any adverse material which
3 the tribunal may take into account when forming its opinion. The principle is lame
4 if the party does not know the substance of what is said against him (or her), for
5 what he does not know he cannot answer. The requirement of openness is
6 particularly important in proceedings for adoption, not only because it may lead to
7 the deprivation of parental rights, in the self-centred meaning of that word, but
8 because a successful application to adopt brings about a total rupture of the
9 mutual relationship of responsibility and dependency which is the essence of the
10 parental bond. The unique character of the relationship which the parent will lose,
11 and the general irreversible nature of the loss, make it specially important that in
12 simple fairness to the parent he or she is aware of anything which may tend to
13 bring it about. There is more to it than this, however, since fairness to a parent is a
14 reflection of fairness to the child. The erasure of the bond with the natural parent
15 and the creation of an entirely new set of responsibilities and dependencies shared
16 with the adopters is an event of critical importance in the life of the child, whose
17 paramount welfare demands that such a momentous step is taken only after a
18 process which is as fair and thorough as can be devised.”
19

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

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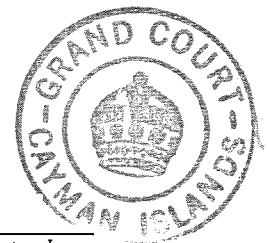


1 Lord Diplock referred to the fact that in the Court of Appeal Lord Denning, MR, had
2 looked at ss.(8) of s.17 of the Employment Act 1980, “*in isolation, divorced from all*
3 *other provisions of the section of which it formed a part*”, and ended up with a
4 conclusion that “*could never be reached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

11
12 So, the quotation relied upon by Mr. Timms, QC, from Lord Diplock’s speech at 233
13 B-C is a commentary on what Lord Denning had done.

14
15 This is what Lord Diplock said:

16
17 *“Under our adversary system of procedure, for a judge to disregard the rule by*
18 *which counsel are bound has the effect of depriving the parties to the action of the*
19 *benefit of one of the most fundamental rules of natural justice: the right of each to*
20 *be informed of any point adverse to him that is going to be relied upon by the*
21 *judge and to be given an opportunity of stating what his answer to it is. In the*
22 *instant case counsel for Hamilton and Bould complained that Lord Denning M.R.*
23 *had selected one speech alone to rely upon out of many that had been made in the*
24 *course of the passage of what was a highly controversial Bill through the two*
25 *Houses of Parliament; and that if he, as counsel, had known that the Master of the*
26 *Rolls was going to do that, not only would he have wished to criticize what Lord*
27 *Wedderburn had said in his speech in the House of Lords, but he would also have*
28 *wished to rely on other speeches disagreeing with Lord Wedderburn if he, as*
29 *counsel, had been entitled to refer to Hansard.”*
30
31



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

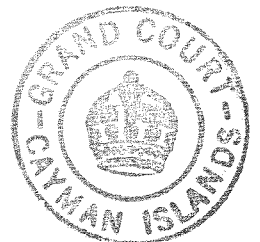
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5 32. I agree with Mr. Timms, QC, that one has to be careful when comparing an objector in
6 the statutory scheme of the United Kingdom with an objector in the Cayman Islands.
7 This, he said, is necessary in considering cases from the United Kingdom. However, I
8 think that the case *Vicente v Secretary of State for Communities and Local*
9 *Government*⁹, cited by Mr. Asif, QC, is a useful guide in the determination of the
10 instant point in the matter before me. In the *Vicente* case, which dealt with what is
11 required for procedural fairness in an administrative or quasi-judicial process,
12 Lewison, LJ , said he did not consider that fairness required that the objectors to an
13 application for planning permission were to be able to listen to every single word that
14 the inspector heard at the hearing¹⁰. Burnett, LJ, said that the circumstances are
15 “*necessarily fact and context specific.*”¹¹

16
17 33. In the instant case, that is, on appeal before me, the objectors were notified of the
18 hearing and given ample opportunity to state their objections. They took advantage of
19 the opportunity to put their objection and reasons therefor in writing. Several attended
20 the hearing. Others indicated in writing that they would not be attending. The minutes
21 of the meeting indicate that their reasons were stated by them with much clarity. They
22 really had no need for information from the government agencies, as their objections
23 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



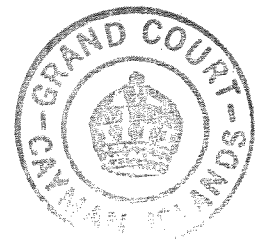
1 There was no obligation on the CPA to provide the objectors with more reasons than
2 they stated in their letters of objection. Nor was there any obligation on the part of the
3 CPA to share the information they received from the agencies with anyone apart from
4 the applicant. Furthermore, given the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

7
8 34. There was a further allegation of reliance by the CPA on undisclosed matters as
9 regards the location of a commercial development directly across from the site, and
10 Treasure Island being on the same lane as the development. It is interesting that Mr.
11 Timms, in his written submissions, did what he complained of: he provided his own
12 evidence of the location of Treasure Island. In my view, this particular complaint
13 amounts to a mere quibble that can gain no traction.

14
15 35. The record of appeal at page 521 reads thus:

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

20
21
22 36. Mr. Neil Timms, QC, said that there is nothing to indicate that the CPA discounted this
23 statement, or regarded it as irrelevant or distinguished. Consequently, he submitted, the
24 CPA appears to have taken it into account.



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

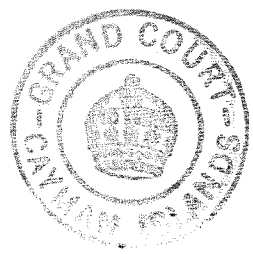
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4 38. Mr. Timms submitted further that the CPA appears to have been unduly impressed by
5 “this prior decision” and so committed an error of law that the PAT should have found.
6 In its judgment, the PAT stated that Mr. Asif, QC, had noted that the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

11
12 39. Mrs. Suzanne Bothwell, who appeared with Mrs. Marilyn Brandt for the PAT, did not
13 agree that an earlier decision of the CPA was irrelevant. On the contrary, she submitted
14 that the existence of a planning permission or lapsed planning permission is recognized
15 by the case law as a material consideration to be weighed by a planning authority. In
16 support of this submission, she relied on the case *New Forest D.C. v Secretary of State*
17 *for the Environment*¹². That case contains references to *Spackman v Secretary of*
18 *State for the Environment*¹³ and *South Oxfordshire D.C v Secretary of State for the*
19 *Environment*¹⁴.

20
21 In *Spackman*, it was accepted that the existence of a planning permission was a vitally
22 material consideration for a planning authority.

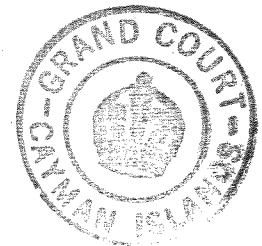
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¹² [1995] EGCS 136
¹³ (1977) 1 All ER 257 at 261
¹⁴ [1981] 1 WLR 1092 at 1096 E-H



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

10
11 40. In the circumstances, it seems to me that this question of the consideration of an earlier
12 planning decision is a non-issue as there is no evidence that the earlier decision was
13 taken into account by the CPA. However, if the CPA did take it into account, there was
14 no error of law in so doing.



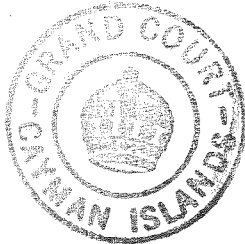
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THE DEVELOPMENT PLAN –THE LAW AND THE REGULATIONS:

ALLEGED ERROR OF LAW BY THE PAT

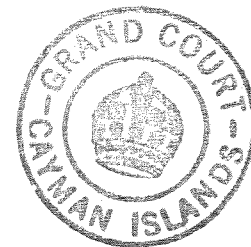
41. The CPA said that in arriving at its decision on the application, it had considered the analysis that had been done by the Planning Department, as well as the provisions of the Law and the Development and Planning Regulations (2013 Revision). It formed the view that the application was in keeping 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.



1 43. The PAT did not consider it appropriate to substitute its views for those of the CPA
2 which, it said, had weighed the competing interests and approved the development.
3 The PAT rejected as “pure speculation” the suggestion from counsel for Grandview
4 that the development would have an adverse effect on tourism. There was no evidence
5 to support the suggestion, said the PAT. As regards the character of the
6 neighbourhood, the PAT said that the Development Plan, having been formulated in
7 1997, and there having been changes in the Regulations since then to permit higher
8 buildings, there would necessarily be a difference in character between the older
9 buildings and the newer ones.

10
11 44. Mr Timms, QC, submitted that the PAT erred in failing to find that the CPA had erred
12 in not applying policies stated in the Development Plan. He quoted from the Plan to
13 indicate that there is a requirement that in the zone in question, there be careful
14 regulation “*to ensure that the needs of the tourist industry are met and that new*
15 *buildings will in general be related to the needs of the industry*”. Those needs, he said,
16 include “those of the condominiums adjacent to the site and the Island generally”. He
17 said, quoting from the Development Plan, that the CPA had to satisfy itself “*that the*
18 *layout, scale and massing of the development are compatible with the ecological,*
19 *aesthetics and other physical characteristics of the site and that a high quality of*
20 *design and landscaping are used*”.



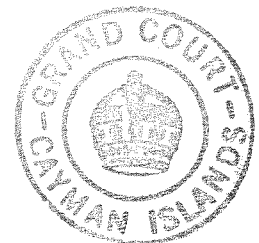
1 45. The learned Queen’s Counsel was very critical of the CPA, saying the CPA did not
2 consider the Development Plan’s provisions adequately or at all, and that it either
3 ignored the various heads of consideration or treated them with casual indifference.
4 The CPA, he said, had a responsibility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

10
11 46. Mrs. Bothwell, for the PAT, noted that the introductory statement to the Development
12 Plan indicates that the Plan is to be regarded as guidelines to be applied with
13 flexibility, understanding and commonsense by the CPA. She submitted that there are
14 quite a few regulations that were brought into force after the Development Plan and in
15 the circumstances, there ought not to be a slavish following of the Development Plan,
16 to the exclusion of the Regulations.

17
18 47. Mr. Asif, QC, also expressed the view that the Development Plan should not be
19 slavishly followed, and that the CPA and the PAT cannot be hidebound by a
20 Development Plan that is 20 years old. He cited the Cayman Islands case *Cortina*
21 *Villas v P.A.T*¹⁵ in which Sanderson J quoted and adopted a passage at page 557 of the
22 fifth edition of *Judicial Review of Administrative Action by De Smith - Woolf, and*
23 *Jowell*. That passage cautioned against a slavish adherence to government circulars or
24 development plans.

25

¹⁵ [2000] CILR 360

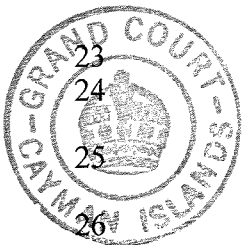


1 48. Without suggesting at this time that there has been a non-adherence to the
2 Development Plan, it may be useful to say that, in my opinion, non-adherence has to be
3 in a significant way on a matter of great importance for a planning permission to be
4 overturned. The foremost consideration is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

6
7 49. In *Simpson v Edinburgh Corporation*¹⁶, a case involving planning permission, the
8 legislation provided that where application was made to the local planning authority
9 for planning permission, the authority may grant permission either unconditionally or
10 subject to such condition as they think fit, and in dealing with such application, the
11 authority shall have regard to the provisions of the development plan, so far as material
12 thereto, and other material considerations. This is similar to the legislation in the
13 instant case. Lord Guest noted that the legislation obliges the authority to have regard
14 to the provisions of the Development Plan. However, he said that he did not interpret
15 the words “to have regard to” as meaning “slavishly to adhere to”. He said that what
16 was meant was that the planning authority was to consider the Development Plan, but
17 there was no obligation to follow it. This interpretation is quite apt in the instant
18 situation especially when it is considered that the Regulations take priority to the plan
19 where there is a conflict.

20
21 50. The Department of Environment did not support the proposed development, on the
22 basis that:

- 23
24 i. The scale, mass and density of development is inappropriate for this location and
25 the site’s constraints;
26



¹⁶ [1961] SLT 17

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

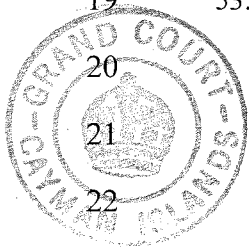
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5 iii. The applicant has not provided sufficient supporting evidence to demonstrate that
6 construction of these buildings is physically feasible.

7
8 51. This latter point on the physical feasibility of the buildings seems strange to me
9 considering that the Department of Planning, which received the plans and which
10 would obviously have in its fold, experts in this area, has not raised any concerns in
11 this regard. I hardly think that this can be a proper basis for objection by the
12 Department of Environment. As regards the setbacks, it has already been observed that
13 the CPA gave certain directions when it granted permission with conditions.

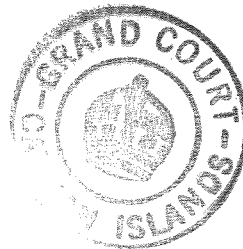
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15 52. It is therefore incorrect to put forward the idea that the concerns of the Department of
16 Environment were not considered. The fact that the CPA did not agree with the
17 Department of Environment does not mean that there was no consideration.

18
19 53. In respect of the scale, mass and density of the development, the CPA obviously did
20 not see eye to eye with the Department of Environment on the matter. There is nothing
21 to compel the CPA to see everything in the same manner in which that department sees
22 it. Were it otherwise, then the Law would not have entrusted the decision-making
23 power to the CPA.

24
25 54. When it comes to scale, mass and density, the CPA had other views that it had to take
26 into account. Indeed, the Department of Environmental Health had no objections to the
27 proposal. That department only required that full details on the proposed swimming
28 pool be submitted for review and approval.



1 55. As far as road capacity issues are concerned, the National Roads Authority said that the
2 impact of the proposed development onto Snooze Lane would be minimal.
3
4 56. It seems to me that the CPA considered the views of all the departments and the
5 objectors.
6
7 57. Invariably in matters of this nature, there will be differences of opinion. One
8 Grandview objector said that the development is to take place on the last remaining
9 piece of land left over from the development of Treasure Island and Grandview, and
10 that a ten-storey building will look ugly and completely overwhelm the views of this
11 part of the beach. That which looks ugly to the objector will not necessarily be ugly to
12 the CPA which is tasked with the responsibility of making the decision. As one writer
13 puts it: "Ugliness is a point of view: an ulcer may be beautiful to a pathologist." It is
14 perhaps more conventional to quote either Lew Wallace or Margaret Wolfe Hunger-
15 Ford and simply say: "*Beauty is altogether in the eye of the beholder.*"



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SETBACKS

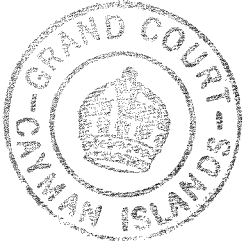
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58. Having considered the Development Plan, the Law and the Regulations, I am concerned as to how the area of setbacks was handled by the PAT and, indeed, the CPA.

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).



1
2 Regulation 8(2) deals with the height of buildings in the various zones, with a
3 provision in 8(2)(e) that the maximum permitted height of a building in this particular
4 zone is one hundred and thirty feet or ten storeys, whichever is less. The application
5 here is for one of ten storeys.

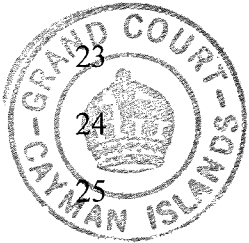
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7 Regulation 8(10) makes various specific provisions for waterfront property, which this
8 property is.

9
10 In respect of a hotel/tourism zone, as this zone is, regulation 8 (10)(e) provides that:

11
12 *“all structures and buildings up to three storeys...shall be setback a minimum of*
13 *one hundred and thirty feet from the high water mark, with an additional fifteen*
14 *foot setback for the third through the seventh storey”.*
15

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

20
21 62. Regulation 8(11) gives the CPA the power to grant permission for a setback to be
22 located at a lesser distance than that prescribed in 8(10)(e). However, in doing so, the
23 CPA must have regard for certain matters such as the elevation of the property and its
24 environs, the geology of the property, the storm/beach ridge, the existence of a
25 protective reef adjacent to the proposed development, the location of adjacent
26 development and any other material consideration which the CPA considers will affect
27 the proposal.

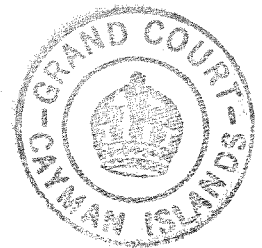


1 63. It has to be stressed that this Regulation is very important, in my view. Matters relating
2 to the geology of the property, the storm/beach ridge and the existence of a protective
3 reef cannot be treated lightly, given the nature of the environment.

4
5 64. In its analysis, the Department of Planning pointed to the deficiencies in the proposed
6 setbacks, and suggested that the CPA needed to determine if the lesser setbacks could
7 be allowed. It is no doubt due to this suggestion that the CPA directed Bronte to submit
8 a revised site plan with a setback of one hundred and forty five feet, ostensibly in
9 keeping with the regulations.

10
11 65. Mr. Timms has vigorously challenged the CPA’s decision in this regard and the failure
12 of the PAT to have found that there was an error of law. He submitted that the CPA
13 should have required Bronte to make a new application as there was now “*a materially*
14 *different layout from the site plan*”. He said that the new setback should be either 190
15 or 205 feet, depending on how one interprets the Regulation and/or the subsequent
16 amendment. With that in mind, he said that “*the erection of the separate second four-*
17 *storey building would not be physically possible and/or the application would be*
18 *fundamentally flawed*”. Additionally, he submitted that the CPA did not give any
19 consideration to setback in respect of the storeys above the seventh storey. It ought to
20 have said how it exercised its discretion, if it had considered that point, he said. The
21 PAT, he submitted, had wrongly concluded that the CPA had not erred in law in this
22 respect.

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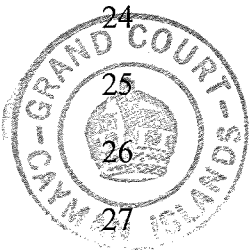


1 66. Mrs. Bothwell submitted that the CPA had followed the regulations in that the
2 application met the minimum requirements as to setbacks. There is no need for a new
3 application, she said, as Grandview was not contending “that the grant and conditions
4 attached were so far removed from the original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

6
7 67. Learned Queen’s Counsel, Mr Asif, endorsed Mrs. Bothwell’s submissions and added
8 that there is no reason for the setback for a three-storey building to be different from
9 that of a ten-storey. It is not irrational, he said, for there to be no difference. He
10 differed from Mr. Timms’ position that the taller the building, the greater should be the
11 setback.

12
13 68. The PAT found that the intention of the legislature was “to require buildings over three
14 storeys high to setback a total of 145’ from the high water mark”.

15
16 69. I agree with the interpretation put on the Regulation by the PAT. The words in an
17 enactment are to be given their natural meaning. Regulation 8(10)(e) states that there
18 shall be a minimum setback of one hundred and thirty (130) feet from the high water
19 mark, with an additional setback for the third through to the seventh storey. Those
20 words are plain and simple. They mean a setback of one hundred and forty-five feet for
21 a building up to seven storeys. However, this is a building of ten storeys, not seven. I
22 reject the idea that there is no need for the contemplation of setback beyond seven
23 storeys. The limitation in the regulation to seven storeys means, in my view, that the
24 CPA is restricted to dealing with a building of seven storeys. This is so until there is an
25 amendment that provides for what is to happen in the case of buildings over seven
26 storeys.
27



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

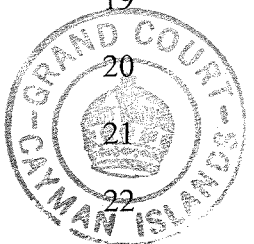
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5 71. There is another aspect of concern that stems from my considerations in relation to the
6 treatment of setbacks.

7
8 The proposed development calls for two sets of apartments on the lot. The Department
9 of Planning shares the view of all the objectors that the ten-storey building is not in
10 keeping with the character of the other buildings in the area whereas the four-storey
11 building is. The Department of Planning also referred to the drawings as depicting a
12 rather architecturally bland building.

13
14 Given those observations from the Department of Planning, although the CPA is
15 entitled to differ from the objectors and all others, one would expect that the CPA
16 would not only give its reasons for applying minimum setbacks to a project of this size,
17 but also for approving a building that is apparently generally regarded as ugly and out
18 of character with those around.

19
20 In particular, the CPA ought to have stated how it dealt with the question of setbacks in
21 respect of the eighth, ninth and tenth storeys, if it dealt with it at all.

22
23 I am not saying that the CPA is obliged to give reasons for all its decisions. Indeed,
24 there is no requirement in the legislation for this to be done. In the instant case, it may
25 well have very good reasons for its decision.



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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

9 



10 **Mr. Justice Seymour Panton**
11 **Acting Judge of the Grand Court**