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Court of Appeal Rules Grand Court Judgment Erroneous and DOE Erred in Law, but Remits Matter to CPA for Reconsideration

George Town, Grand Cayman— 1st September 2023 — The Central Planning Authority (the "CPA") is in receipt of the Cayman Islands Court of Appeal's ("CICA's") judgment in respect of the CPA's appeal of the Grand Court's decision on the Judicial Review application brought against the CPA by the National Conservation Council ("NCC"). At the commencement of the hearing of the Appeal, the CICA confirmed that Justice Walters (Acting) had fallen into error and, on that basis, the decision of the Grand Court was rejected by the CICA. The CICA also ruled that the directive issued by the Director of Department of Environment (DOE) to the CPA to refuse planning permission was unlawful, since pursuant to Section 41 (3) and (4) of the National Conservation Act ("the NCA"), it is for the CPA to determine for itself whether an adverse effect is likely, before it refers the matter to the NCC. Consequently, the NCC/DOE cannot pre-emptively direct the CPA to refer the matter to the NCC based on adverse effect. However, since the Appeal was quashed on other grounds, namely on the basis of inadequate reasons regarding the CPA's consideration of Section 41 of the NCA. The matter has therefore been remitted by the CICA to the CPA for reconsideration. This means that the CPA will have to consider the planning application again, taking account of the CICA's guidance. In so doing, the CPA will endeavour to provide more detailed reasons for its decision regarding its consideration of Section 41 of the NCA. The CPA also understands that the CICA judgment demonstrates the need for significant improvement in the interaction between the CPA and the NCC in respect of the planning applications process.

For all those reasons, the CPA believes its Appeal was warranted and the CICA's decision has made it clear why it was necessary for the CPA to bring the Appeal. The CICA's judgment transcends the subject planning application and confirms that the Director of the DOE must follow the provisions of the NCA and further that the NCA does not give the Director of DOE the statutory remit to unlawfully interfere with or usurp the functions of the CPA.

By way of background, judicial review litigation was commenced against the CPA by the DOE/NCC in 2022 when the DOE/NCC disagreed with a decision of the CPA to grant planning permission for an application for a replacement cabana and seawall on Boggy Sands Road purportedly in contravention of a directive issued by the Director of the Department of Environment ("the DOE") to refuse planning permission. Such directive was made on the basis that the construction would cause turbidity and sedimentation in the adjacent Marine Park protected area. It is important to note that the application related to the **replacement of an existing** seawall and cabana, both of which are structurally unsound and which all parties involved have accepted will eventually collapse into the ocean unless repaired, replaced or removed. It should also be noted that the removal of the seawall entirely would seem to not be a viable solution, as this would cause a break in the seawall/revetment system *in situ* along the side of that area of Boggy Sands Road and extending the length of Mary Molly Hydes Road, most of which seawall was built by the Government, and this would eventually undermine the road itself by wave action, possibly cutting off all access to Boggy Sands Road. The owner of the property ("the Applicant") had applied to the CPA to replace the existing structures with a smaller, curved seawall, which would be set back further from the sea and behind that seawall a new single storey cabana was proposed, to replace the existing compromised structure. The CPA first considered the legality of the directive it had received from the DOE and decided that it was unlawful, a position which was

ultimately accepted and conceded by the DOE during the proceedings in the CICA. After deciding that the directive was unlawful, the CPA went on to consider the application and its decision to grant permission was then made on the basis that the serious structural defects in the existing seawall and cabana justified the proposed remedial works. The CPA took into account that the new seawall would be smaller and set back further form the sea and would be curved, as had been previously recommended by the DOE. On that basis the CPA decided the proposed development would be less of a threat to the environment than the existing structure was. It is important to note that the DOE's concern was not the proposed development itself*,* but that runoff during the construction period would somehow enter the protected area. Given that the replacement seawall was to be constructed inside of the existing seawall (which would only be removed once construction was completed), and given that the Applicant had presented a number of additional measures which it would take to prevent any run-off from entering into the ocean, including pumping away any surface water runoff, the CPA granted planning permission to replace the existing, structurally defective development with a smaller one, which in their view was an improvement in all aspects, including environmental.

Unfortunately, rather than trying to resolve its dispute with the CPA or asking Cabinet to assist in resolving the difference in opinions, as is provided for by the Development and Planning Act, the DOE took the view, despite receiving legal advice from the Attorney General to the contrary, to submit an application to the Grand Court for a judicial review of the CPA's decision to grant planning permission. Furthermore, such action was taken even before the expiry of the timeframe allowed for CPA to respond to the DOE's letter before action, in breach of a long-standing Direction of the Grand Court regarding the process in respect of Judicial Review applications. In those circumstances, and since it was clear that the DOE/NCC was not interested

in discussing alternative ways of resolving its grievance with the CPA, the CPA had no choice but to, in the first instance, defend itself against the judicial review in the Grand Court and then, consequently, to appeal the flawed decision of the Grand Court to the CICA.

The CPA understands that the CICA has remitted the application back to the CPA on the basis that the written decision of the CPA did not give sufficient detailed reasons for its decision that the approval of the application would not likely have an adverse effect on a "Protected Area". While the CPA reserves its right to appeal the CICA judgment to the Privy Council, subject to any such appeal, the CPA will carefully consider the CICA's guidance and, going forward, the CPA will seek to improve its decision making and recording process accordingly. Had the CPA known at the outset of the Grand Court proceedings that the NCC's main grievance with its decision would ultimately be a lack of sufficient written reasons for the CPA's decision, rather than the original grounds of judicial review filed by the DOE/NCC, the CPA would have been able to readily resolve that issue without the need to expend significant time and legal fees on this matter, contesting issues which were subsequently accepted, abandoned and/or conceded by the DOE/NCC.

Obviously, the CPA understands that the judgment of the Court of Appeal clearly confirms that communication and consultative processes between the CPA and the NCC need to be streamlined and enhanced so as to operate on a more cooperative basis. The CPA is encouraged that it is now an agreed position between the parties, which has been accepted by the CICA, that the Director of DOE's directive was unlawful, notwithstanding that the original Judicial Review was made in direct challenge of the CPA's decision that such directive was unlawful. The CPA is also grateful that it is now an agreed position (despite it also initially being a contentious matter in the Grand Court proceedings) that it is the CPA, not the DOE, who must decide whether it is

obliged to refer any application under either Section 41 (3) or 41 (4) of the National Conservation Act ("NCA"), on the basis of there likely being an adverse effect.

The CPA also notes the recent appointment of a new NCC Board and is hopeful that going forward, rather than the Director of Environment pre-emptively issuing unlawful "directives" to the CPA, the NCC and the CPA can now work together in the performance of their statutory functions by way of an open and transparent process. The CPA feels strongly that this process should also include the applicants for planning permission, as the CPA believes this is what was intended by Parliament with the advent of the NCA. The CPA believes that such cooperation will foster a working relationship that better reflects the open and transparent process required by the NCA itself as well as being more concordant with the provisions of the Constitution and the established principles of the rule of law, as regards the functions of public authorities.

Notwithstanding the history of this matter and the CPA's right to appeal the CICA judgment, the CPA looks forward to working with the NCC to settle and streamline the consultation and review process moving forward. Furthermore, the CPA is hopeful that, in any event Cabinet will assist in settling any issues between the CPA and NCC, in order to avoid further unnecessary litigation between the two public authorities and/or affected interested parties. In that regard, the CPA trusts that in the event of any future disputes between the CPA and NCC, Cabinet will assist in the expeditious resolution of such disputes by way of either its appellate authority under Section 39 of the NCA or by way of the process prescribed in Section 51 (2) of the DPA.

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