BEFORE THE PLANNING APPEALS TRIBUNAL

IN THE MATTER OF SECTION 48 OF THE DEVELOPMENT AND PLANNING LAW (2017 REVISION)

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE CENTRAL PLANNING AUTHORITY WHERE PERMISSION WAS GRANTED ON NOVEMBER 20, 2019 IN RESPECT OF DEVELOPMENT OF BLOCK 32D PARCELS 313, 122 & 5 AND BLOCK 38E PARCEL 282 IN REGISTRATION SECTION LOWER VALLEY

BETWEEN	**CEDAR VALLEY LTD.**	
	FLAMSTEAD LTD.	**APPELLANTS**
AND	**CENTRAL PLANNING AUTHORITY**	**1st RESPONDENT**
	BEACH BAY LAND LTD.	**2nd RESPONDENT**

CORAM

Peter A. Broadhurst (Chair)

Aston Ebanks

Nickolas DaCosta

Travis Ritch

APEARANCES

<u>Zoom Attendees:</u>

Spencer Levine	Applicant Party
Albert Yeh	Applicant Party
Ryan Melkonian	Applicant Party
Selina Tibbetts,	Jackson Law Secretary, Appellants Party
John Broadbent	Appellants

Physically Present:

James Samuel Jackson	Counsel for the Appellants
Sven Cornelssen	Appellants
Celia Middleton	Counsel for the 1st Respondent
Michaiah Bryan	AG Chambers (Observer, 1st Respondent)
Haroon Pandohie	Director of Planning
Ron Sanderson	Observer, 1st Respondent
Alex Henderson, Q.C.	Counsel for the Second Respondent
Andrew Gibb	Agent for Applicant
Sheena Bush	Objector
Anne Meryn	Objector
Sharon Davis	Objector
Nicholas Sykes	Objector
William Steward	Observer/Objector
Vane Vasiliev	Objector
Wendy Ledger	Media

DATE OF HEARING: SEPTEMBER 18 2020

DECISION

The decision of this Tribunal is to dismiss the appeal and uphold the decision of the Central Planning Authority (the "Authority") with the modification agreed by the Second Respondent of granting a 60ft right of way to the sea as opposed to the 12ft right of way approved by the Authority.

BRIEF FACTS AND PROCEDURAL HISTORY

The 2nd Respondent in May 2019 submitted an application for planning permission to the 1st Respondent for a development comprising of a resort hotel with residences, spa, conference centre, and tennis court.

The 1st Respondent heard the application on September 11, 2019, and the hearing was adjourned for the following reasons:

1. In order for the Authority to fully and properly consider the application, the applicant is required to submit revised plans showing:

    - The required 12' wide public access to the sea relocated adjacent to the public road reserve along the westerly property boundary.

    - Compliance with all required setbacks.

    - The BOH facilities relocated such that they are not next to existing residential development.

    - A minimum of 285 parking spaces.

2. Given the required changes noted above, the applicant must re- notify the adjacent land owners within the required notification radius."

The application was again listed for hearing on November 20, 2019 and approval was granted subject to certain conditions. The 1st Respondent provided reasons for the decision and the Applicant and the Objectors were advised of the 1st Respondent's decision by way of letter dated December 3, 2019.

The Notice of Appeal was filed on the 13th December 2019.

The matter was originally set down for hearing before the Tribunal on the 24th April 2020 but was postponed due to the COVID-19 pandemic along with all other Tribunal matters active at the time.

Upon resumption of Tribunal business, the matter was again set down for hearing on July 28 2020 for a hearing to take place on the 18th September 2020.

Upon being served with the notice of the new date the Appellants' Counsel on 29th July 2020 sought to adjourn the hearing date which was denied.

The Appellants' Counsel then made a further request for adjournment on the 20th August 2020, the day before his written submissions were due. This application was also denied.

Counsel for the Appellants, Mr Jackson, then wrote what can only be described as a missive to the Chief Officer of the Ministry of Commerce, Planning and Infrastructure copying the Minister setting out a series of complaints with respect to the treatment his clients were receiving, the principal complaint being that the person instructing him on behalf of his clients, Mr John Broadbent was currently in the UK attending to personal medical matters and wished to personally attend the hearing. In essence he was requesting that the Minister, or Chief Officer under the direction of the Minister, postpone the hearing. This letter was passed to myself as the Chair appointed to the Tribunal set to hear the appeal, indicating that this was a matter for the Chairman of the Planning Appeals Tribunal and not for the Chief Officer or the Minister/Ministry.

The matter of an adjournment was canvassed by the Secretary of the Tribunal and the 1st Respondent took a neutral position with the 2nd Respondent indicating that it wished to proceed.

The Appellants, having been advised of the positions of the Respondents and the ruling by the Chairman to proceed with the hearing with arrangements being made for Mr Broadbent to attend by Zoom, stated on August 31 that he "felt constrained to move forward with the appeal with a view to the same being heard on the 18th of September." He further advised that he would be filing written submissions as soon as possible although he felt there was no obligation in the Development and Planning (Appeals) Rules to do so.

The hearing of the Appeal commenced at 10am on the 18th September 2020 and the Chairman asked Mr Jackson for the Appellants about preliminary matters.

PRELIMINARY OBJECTIONS

Mr Jackson on behalf of the Appellants raised preliminary objections by way of a motion to adjourn the proceedings.

His stated objections were as follows:

1 No response was received to the issues he raised by way of his letter to the Chief Officer.

2 There has been a breach of procedure in that there is no Record produced as called for in the Appeal Rules.

3 There should be no inclusion of the map included in Mr Henderson QC's Submissions in Reply on the basis that it is fresh evidence.[1]

4 The Appeal Brief is defective in that the maps produced by the Planning Department as Exhibit 2 were not included in the Brief.

Mr Jackson submitted that these matters raised a serious prejudice to his clients and constituted a breach of natural justice. Accordingly, it was only appropriate that the matter be adjourned. Mr Jackson did concede that he had been able to prepare a substantial bundle comprising the elements of the Record from materials available to him, including the Brief in the form of a CD-ROM.

The Tribunal asked for comment from the other parties to the Appeal.

Ms Celia Middleton on behalf of the 1st Respondent took a neutral position.

Mr Alex Henderson QC on behalf of the 2nd Respondent objected to the request for an adjournment.

Mr Henderson QC stated that a delay would be seriously prejudicial to his client; he advised that he was instructed that the additional expense of a delay would incur costs in the order of $1,000,000 per month to his client whereas there really was no prejudice to Mr Jackson's clients.

He further stated that all of the maps in Exhibit 2 were available to Mr Jackson's clients and could have been reviewed by Mr Bovell who represented the Appellants at the Application hearings on behalf of Mr Broadbent. These maps had been available for the public, and in any event Mr Jackson had been provided with them two days before the hearing giving him ample time to assess their relevance and weight and take instructions from his client, and the contents thereof provided no prejudice to his clients, as they simply related to the changes requested by the Authority on the first hearing of the Application and which had been thoroughly discussed at the renewed hearing before the Authority which resulted in approval being granted.

[1] The original Written Submissions of the 2nd Respondent were prepared and submitted at the time when Mr. Jackson was objecting to submitting his own. When Mr Jackson did provide his written submissions, Mr. Henderson QC made submissions in reply, and these are the substantive submissions on which Mr. Henderson QC relies.

With respect to the map included in his submissions Mr Henderson QC advised that the map was not evidence at all but merely illustrative of his submissions and part of his argument.

The Chairman advised that the Tribunal would adjourn the hearing for a short time to consider the arguments and the Tribunal left the hearing room for that purpose.

Upon returning the Chairman ruled as follows:

1 The Tribunal considered that the irregularities in the proceedings did not prejudice the proceedings in that:

2 The Tribunal was satisfied that the Appellants had the documentation required in the Record, albeit the Brief had been received as a computer disc which Mr Jackson had printed as a page numbered brief. He had also been provided with an Index, the grounds of appeal, the order sought, the Protocol established by the Tribunal, and the Brief pages were numbered in the order in which they appeared therein. All documents considered the Tribunal was of the view that the Appellants' Counsel had an appropriate record of Appeal with which to proceed with the Appeal.

3 The Tribunal was satisfied that the map included in Mr Henderson QC's submissions did not constitute additional evidence but was rather illustrative of his written submissions and an aid to his oral submissions and in any event did not materially differ from the project maps already brought before the Authority with the addition of an illustration of the location of a potential 60' right of way if required.

4 With respect to the missing documents produced as Exhibit 2 the Tribunal was satisfied that they consisted of maps setting out the resubmissions as requested by the Authority, had been available at the hearing before the Authority and were inadvertently missed in the reproduction of the appeal bundle (in their place were the original maps from before the changes requested by the Authority had been made). The changes reflected in the maps had been canvassed thoroughly in the hearing of the adjourned application.

In conclusion the Tribunal was of the opinion that the arguments raised by the Appellants for an adjournment were not persuasive; there would be no prejudice to the Appellants; and conversely there would be prejudice to the 2nd Respondent, which endured months of costly delay in having the matter heard due to COVID-19, in the order of $1m in interest payments per month on development capital. The balance favoured the 2nd Respondent and the Tribunal could see no reason why the Appellants were prejudiced whose goal was to stop the development which could not proceed without the resolution of the appeal in any event. Accordingly, the Application for adjournment was denied and Mr Jackson was invited to proceed with his submissions, as he had indicated he was prepared to do if the Tribunal did not agree with him on the matter of an adjournment.

THE SUBMISSIONS OF THE APPELLANTS.

Mr Jackson on behalf of the Appellants submitted as follows (Highlights are those of Mr Jackson):

1 **The decision was erroneous in Law** in that the Authority erred in respect of Regulation 32 of the Development and Planning Regulations (2020 Revision) (the Regulations) by approving the application with a mere 12' dedicated right of way. He reproduced Reg 32 and submitted that it was a mandatory regulation and is not subject to any discretion by the Authority, nor were there any applicable powers of variation under the Regulations. He submitted that since the application has a shoreline of 2000' the application should not have been approved with less than 60' of dedicated right of way from a public road to the sea.

2 Regulation 32 states:

"*In Hotel/Tourism zones, the Authority, when granting planning permission in relation to land which has a shoreline of two hundred feet or more in a development other than private single dwelling units, shall require the owner to set aside and dedicate to the public a right of way of not less than six feet in width per every two hundred feet, from the public road to the sea, on the subject property; and such right of way may be within the area set aside for setbacks under these Regulations.*"

3 **The decision was unreasonable** in that in approving the application the Authority acted in a manner that is so patently unreasonable, irrational and was clearly arrived at on an improper basis. He cited the case of *Associated Provincial Picture House Ltd v Wednesbury Corporation (1948) 1 KB 223* and *R v Compensation Board, Ex P.Cook [1996] 2 All ER 158.*

4 In support of these submissions Mr Jackson advanced the following arguments.

a) The decision of the authority placed an impermissible reliance upon the eventual/theoretical construction of the roadway which is contemplated by BP40.
b) The presumption that BP40 will be constructed upon or closely following the construction of the development is an irrational presumption in the light of the actual submissions provided in relation thereto by the National

Roads Authority (the NRA) which essentially said that the developer and the Cayman Islands Government (CIG) would need to enter into an agreement regarding the construction of such road. Mr Jackson stated that there was no evidence presented to the Authority that the Applicant had such an agreement with the CIG nor was there anything in the record based upon which the Authority could have been satisfied that BP40 would actually be constructed so as to serve as part of the necessary ancillary infrastructure that the Development would require to function.

c) "at the very least the Authority should have made the approval subject to a condition that an agreement for the construction of BP40, as per the submitted plans, is entered into between the developer and CIG and produced to the Authority prior to commencing works."
d) The approved application also included a roundabout which would have to be constructed on privately owned land and the Applicant undertook no efforts to amend the plans, enter into an agreement with the landowner or otherwise to address the issue.
e) Instead of proceeding reasonably the Authority acted irrationally in approving the Application and placed "illogical and undue reliance on the assumed future construction of the roadway contemplated by BP40, as if the construction thereof was a certainty."
f) "This unreasonable reliance on an abstract future event which future event would not only be material, but crucial for the approved development to be functional, renders the decision unreasonable, in that, given the future event is uncertain, no rationally thinking tribunal, acting reasonably, would have come to such a decision."
g) "In granting permission without properly addressing its mind to such an important matter, it came to a decision which no reasonable tribunal should have come to."

5 **The Authority acted irrationally** by approving the application without having the benefit of advice from either the Water Authority or the Fire Department.

a) The Water Authority required further details in order to provide their memorandum (with respect to wastewater treatment systems).
b) Despite the known lack of input from the Water Authority the Authority deemed it appropriate to proceed with the Application and to approve the application. This amounted to the decision being one which is "irrational/unreasonable". Such a big development required the fullest consultation. Given the lack of consultation with those authorities, the Application appears to have been rushed and the CPA acquiesced and in so doing it failed to take into account important material considerations.
c) It was unreasonable for the authority to hear and approve the Application "in complete absence of any input from the Fire Department" in that "it was entirely unreasonable for the Authority to approve a development of this magnitude, being 10 stories and

comprising a hotel, restaurants, apartments and numerous other amenities without input from the Fire Department in regard to appropriate fire access lanes, etc."

d) The Building Control process does not take the place of full consultation and input at the Planning stage. It is unsatisfactory to leave it to the Building Control process and have that process then find, as has happened in the Cayman Islands previously, that the development cannot be made compliant with the Fire Code as built.

6 **The Authority's decision was unreasonable** in determining that the development would not interfere with natural coastal process as it would be suitably set back from the highwater mark in that the Authority misunderstood and/or misconstrued the memorandum from the National Conservation Council. Mr Jackson stated that the memorandum did not at any point state that the development "will not interfere with natural coastal process." It was therefore unreasonable for the Authority to support their decision with such findings, which were not in fact made.

7 **The Authority's decision was unreasonable** in respect of its decision that adequate public access to the sea will be provided as part of the overall development scheme. Mr Jackson reiterated his comments regarding Regulation 32 and stated that the Authority acted irrationally/unreasonably in making its decision to approve a mere 12 ft. beach access adjacent to the existing 12 ft. public right of way.

8 **The CPA's finding that the proposed development "is in keeping with the character of the surrounding area" is on the face of itself, irrational and illogical**, as all of the development in the surrounding area is comprised almost exclusively of single family dwellings, and "there are no developments anywhere within the extended area which are of the nature and magnitude of the approved development and certainly nothing approaching a 10 storey building." The CPA did not rationalise how the development is in character; they just state that it is.

9 **The Authority's decision was manifestly unreasonable**, based on the number of illogical/irrational assumptions, and misconstructions of various matters and on this basis was a decision which no reasonable authority could have made.

10 **The decision was at variance with the Development Plan 1997**

a) the Authority failed to take into account the general aim of the Development Plan, namely to maintain and enhance the quality of life in the Cayman Islands and referred to s.1.2 of the Development Plan. The authority did not address its mind to the economic impact of the subject development but "seemed instead to make the assumption that it was a large, tourism development and that ipso facto equated to an automatic economic benefit to the people of the Islands."

Mr Jackson went on to state and I quote:

"This would be patently irrational, in and of itself, but such irrationality is compounded when one considers that the development predicts and requires major infrastructural works, such as the construction of the roadway contemplated by BP40. Worse yet, if the development is subject to a development agreement which grants rebates, abatements and/or waivers of significant amounts of government revenues, this could in fact, in and of itself, equate to economic harm to the public purse, in flagrant contravention of clear legislative intent of Section 1.2 of the Development Plan. There was no evidence proffered or adduced by the developer as to the economic benefit of this development and it is common knowledge that the project is supported by the Government. Yet, the CPA did not see fit to enquire into such matters and simply proceeded, blindly it seems, on the presumption that the project would bring a positive economic and social benefit to the people of Cayman. It is therefore submitted that the failure on the part of the CPA to take into account this very relevant and material consideration has resulted in the CPA making the irrational assumption that the proposed development, which is overtly supported by the Government, must be good for the economy of Cayman, and it is further submitted that in making such an assumption, the CPA failed to discharge its own statutory duty to enquire into the economic impact of the proposed development, and, in so doing, it came to a conclusion that no reasonable tribunal could have come to."

11 **The decision was at variance with Provisions 3.04 (a) (c) and (f) of the Development Plan** in that the Authority failed to properly apply this provision as the Application was made in contemplation upon the eventual, hypothetical construction of the roadway contemplated by BP40 and the proposed roundabout would require the compulsory acquisition of private lands.

Provision 3.04 of the Development Plan provides:

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

(f) ensure adequate allowance for public access to the sea.
The Authority shall take into consideration the characteristics of the form of tourist accommodation proposed and shall be satisfied that the layout, scale and massing of development are compatible with the ecological, aesthetics, and other physical characteristics of the site; and that a high quality of design and landscaping are used."

Mr Jackson stated:

> "No such agreements were produced as part of the application and the construction of the roadway contemplated by BP40 and any agreement between the developer and the Cayman Islands Government therefore remains a theory in abstract upon which no basis can be made that the development, expansion and upgrading of facilities (in this instance roadways) is being conducted in an orderly manner."

Mr Jackson also submitted that the Authority failed to apply Provision 3.04(c) in that:

> "The proposed development comprises approximately 41.5 acres of hotel/tourism zoned land (the development is dramatically clustered towards the beach and at 10 storeys in height appears incompatible with the physical characteristics of the small sandy beach area."

And 3.04(f) in that

> "in approving the Application, the Authority failed to properly apply provision 3.04(f) since the 30' public right of way to the beach did not form a part of the Application which was approved with a mere 12' public right of way to the beach."

Mr Jackson also submitted that the Authority had failed to consider or address the 'scenic coastline' provision in 3.10 of the Development Plan, particularly when deciding on setbacks. This consideration was raised in the Planning Department analysis of the application which was before the Authority but Mr. Jackson argues there is no evidence the Authority took the matter into account.

Mr Jackson summarised his overarching submission regarding the Development Plan by submitting:

> "that the CPA's decision is at a variance with Section 1.2 of the Development Plan 1997, in that, the CPA failed to discharge its statutory duty by not performing any evaluation of whether the approved development will serve to maintain and enhance the quality of life of people in the Cayman Islands. It is submitted that it is the CPA's primary statutory duty to effectively direct development so as to safeguard the economic, cultural, social and general welfare of the people of Cayman, as well as the environment, as provided by Section 1.2 and that the CPA, in failing to make any enquiry into and/or to properly address its collective mind to the economic impact of the subject

development, acted in contravention of the clear legislative intent of Section 1.2 of the Development Plan and/or failed to discharge its statutory duty thereunder. Therefore, it is submitted the CPA's decision is at a variance with the Development Plan."

THE SUBMISSIONS OF THE 1ST RESPONDENT.

Reproduced from the submissions of the 1st Respondent

12 **TRIBUNAL'S ROLE AND PROCEDURE**

The powers of the tribunal in respect of an appeal of a decision of the 1st Respondent are provided for by section **48(2)** of the **Development and Planning Law (2017 Revision)** ("the Law"), the relevant portions of which are as follows:

> *"48. (1) Any person who has applied for planning permission, or who has objected to an application for planning permission after being notified of the application in accordance with regulations made under this Law, and who is aggrieved by a decision of the Authority in respect of the application, may, within fourteen days of notification of that decision under section 40, or within such longer period as the Tribunal may in any particular case allow for good cause, appeal against that decision to the Tribunal on the ground that it is -*
>
> *(a) erroneous in law;*
>
> *(b) unreasonable;*
>
> *(c) contrary to the principles of natural justice; or*
>
> *(d) at variance with any development plan having effect in relation thereto,*
>
> *but not otherwise; and such appeal shall be heard by the Tribunal within six months of such appeal being lodged, and such appeal shall be heard and determined based on the record of the hearing to which it relates in accordance with any rules made hereunder.*
>
> *(2) After hearing an appeal hereunder, the Tribunal may confirm, reverse or modify any decision of the Authority or may in appropriate circumstances remit the matter to the Authority with or without directions as to rehearing the matter, and may make such order (including any order for costs) as it thinks just and where the Tribunal finds that an appeal has been made which is frivolous and vexatious, the Tribunal may award costs on an indemnity basis against the appellant."*

13 The role of the tribunal on an appeal from a decision of the 1st Respondent is not to hear the matter *de novo* or to substitute its decision for that of the 1st Respondent. Instead, the role of the tribunal is to decide whether the 1st Respondent's decision was wrong in law, unreasonable, contrary to natural justice or are at variance with a relevant development plan. If the tribunal is not satisfied that at least one of these grounds has been made out, the appeal should be denied.

14 **THE APPELLANTS' GROUNDS OF APPEAL CONSIDERED**

The following paragraphs are reproduced from the written submissions of the 1st Respondent verbatim with certain grammatical errors corrected.

"The 1st Respondent intends to demonstrate that its decision is within the four corners of the law and that the Appellants have failed to establish that the decision was contrary to any of the criteria set out in section 48(1) of the Law.

Ground 1: Decision Erroneous in Law

14.1 The Appellants assert as follows:

> *" It is submitted in approving the subject application, the Authority erred in law in respect of Regulation 32 of the Development and Planning Regulations (2020 Revision) by approving the application with a mere 12' dedication right of way.*
> *It is submitted that Regulation 32 is a mandatory regulation and that it is not subject to any discretion by the Authority, nor are there any applicable powers of variation under the Regulation.*
> *It is further submitted that although this failure to meet the requirements of Regulation 32 is, in and of itself, fatal to the application such error is further compounded by the CPA's failure to comply with the requirements of Section 3.04(f) of the Development Plan 1997 to "ensure adequate allowance for public access to the Sea". It is submitted that light of this provision, the Authority was under a statutory duty to*

ensure that Regulation 32 was properly complied with regard to providing the legally prescribed public access to the sea."

14.2 Regulation 32 of the Development and Planning Regulations (2020 Revision), provides as follows:

"In Hotel/Tourism zones, the Authority, when granting planning permission in relation to land which has a shoreline of two hundred feet or more in a development other than private single dwelling units, shall require the owner to set aside and dedicate to the public a right of way of not less than six feet in width per every two hundred feet, from ***the public road to the sea,*** *on the subject property; and such right of way may be within the area set aside for setbacks under these Regulations."*

14.3 The above regulation requires that a public right of way is set aside and dedicated from the public road to the sea. Looking on the plans before the 1st Respondent. As the current public road already allows for a beach access which adjoins the properties on the western boundary of Block 32D Parcel 122, and the other parcels do not connect to a public road, there is the provision of a new beach access at the western end adjoining BP40.

14.4 The Regulations are subsidiary to the Law which gives the 1st Respondent the power to approve applications on any conditions that they deem fit. Therefore the approval was not *ultra vires* the Law.

15 **Ground 2: Decision Unreasonable**

The Appellants under this ground asserted in summary as follows:

a) The 1st Respondent relied on a presupposition of the roadway BP40 being built in absence of an agreement between the CIG and the developers.

b) No guidance received from the Water Authority or the Fire Department

c) Failure to consider the Public Lands Commissions' recommendation in relation to a public right of way at the east end of the beach.

d) Failing to take into account the general aim of the Development Plan and the attendant zoning regulations.

16 The 1st Respondent submits that its decision was reasonable in the circumstances for the following reasons:

17 Reliance on BP40: the NRA indicated that *"A new agreement between CIG and the current developer* ***will become necessary*** *if planning permission is granted by the CPA for the proposed project"*[2]*.* The NRA has not indicated that the 2nd Respondent will require any agreement between the CIG and itself prior to the grant of planning permission. By using the words "will become necessary" is an indication that the permission is not dependent on the existence of an agreement between the 2nd Respondent and the Government.

18 Further, the NRA closes its report by indicating that as the community in which the 2nd Respondent's development is proposed "will require BP40 to connect Manse Road to Pedro Road or an alternative will eventually be built[3]". Having regard to the further view of the NRA that BP40 or some other such road was an inevitable occurrence, the 1st Respondent approval did not arise in circumstances where there was an illogical /irrational assumption that such a road might be in the future be built.

19 The fact the Water Authority and the Fire Department failed to provide comments is of no moment. There is no requirement that all authorities provide comments at application stage as both the Water Authority and the Fire Department have rules and guidelines which must be complied with during the construction process. Further, one of the conditions of the approval[4] is that the waste water treatment system and disposal system must be approved by the Water

[2] Page 785 of the Appeal Brief
[3] Page 787 of the Appeal Brief
[4] Page 781 of the Appeal Brief

Authority, and the 1st Respondent must be provided with the approval from the Water Authority.

20 The proposed plan provides for a beach access at the eastern side of the property where there currently is no beach access. The PLC recommends that new public beach access connect to the roadway. As the only one new roadway is being envisaged, the current plan provides a beach access to at the eastern side which connects to BP40.

21 The primary objective of the Development Plan is to maintain and enhance the Cayman Islands and the well-being and prosperity of its people subject thereto its environmental character. It is intended to define and develop a planning strategy for the Islands which is flexible enough in concept and implication to accommodate individual requirements, special circumstances and changing conditions.

22 The current version of the Development Plan in force is the 1997 Plan. It is a settled position that a development plan is not to be slavishly adhered to, but the 1st Respondent has a duty to have regard to it. The Court of Session opined in **Simpson v. Edinburgh Corporation 1960 SC 313** as follows:

> *"The defenders have also a plea to the relevancy of the action. This plea has two aspects. In the first place, it is said that section 12 of the Act of 1947, taken with Regulation 8 of the Order of 1950, does not oblige the planning authority to adhere to the provisions of the development plan; and, secondly, that, even if this is the result of the Act and Regulation, there are no relevant averments that the grants of planning permission are contrary to the development plan.*
>
> *Section 12, which has already been quoted, obliges the local authority, in dealing with applications for planning permission, to 'have regard to the provisions of the development plan so far as material thereto and to any other material considerations.' It was argued for the pursuer that this section required the planning authority to adhere strictly to the development plan. I do not so read this section.* ***'To have regard to' does not, in my view, mean 'slavishly to adhere to.' It requires the planning authority to consider the development plan, but***

does not oblige them to follow it. *In view of the nature and purpose of a development plan, to which I shall refer later, I should have been surprised to find an injunction on the planning authority to follow it implicitly, and I do not find anything in the Act to suggest that this was intended. If Parliament had intended the planning authority to adhere to the development plan, it would have been simple so to express it."*

23 Since there is no requirement to follow the plan slavishly but instead to have regard to the Development Plan it is clear that at all material times the Development Plan was at all time being considered, as evidenced by the second reason for the decision of the 1st Respondent which states as follows:

> *"In view of Development Plan (1997) Section 3.04, the Authority considered the characteristics of the proposal and is satisfied that the layout, scale and massing of the development is compatible with the ecological, aesthetics, and other physical characteristics of the site and is in keeping with the character of the surrounding area."*

24 While the 1st Respondent agrees that if it arrived at its decision having taken into account irrelevant material this prima facie could lead to such a decision being deemed unreasonable; contrary to the Appellant's submission, the Respondent in arriving at the challenged decision, only considered relevant factors.

25 In arriving at a reasonable decision, the 1st Respondent must follow the Law and the Regulations thereunder, consider both the 2nd Respondent's written application with supporting documentation and the objectors' written objections, allow both parties to make oral representations if they are present and wish to do so at the meeting appointed to consider the application for planning permission, and finally to make a decision which is allowable by the Law.

26 Section **15** of the Law provides as follows:

> *"15(1) Subject to this section and section 5(1), where application is made to the Authority for outline planning or permission to develop land or permission for a planned area development,* ***the Authority may***

***grant permission either unconditionally or subject to such conditions as it thinks fit, or may refuse permission**."*

27 The 1st Respondent has therefore been given sole discretion to grant permission for development on whatever terms it chooses or to refuse permission. Having regard to the minutes of the meeting of November 20, 2019, it is clear that the 1st Respondent considered all the relevant information which was before it. The 1st Respondent had the 2nd Respondent's application, objector's letters, as well as both parties, were allowed to present oral arguments and questions were asked of the persons who appeared before the Respondent.

28 The Tribunal might find useful guidance in the well-known leading case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 K.B. 223 (2RP 4)** where Lord Greene M.R. said (at 228):

> *"... The courts must always, I think, remember this: first, we are dealing with not a judicial act, but an executive act; secondly, the conditions which, under the exercise of that executive act, may be imposed are in terms, so far as language goes, but within the discretion of the local authority without limitation. Thirdly, the statute provides no appeal from the decision of the local authority. What, then, is the power of the courts?* ***They can only interfere with an act of executive authority if it be shown that the authority has contravened the law.*** *It is for those who assert that the local authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law."*

29 The Tribunal has no jurisdiction to set aside a decision of the 1st Respondent unless the Appellants have demonstrated that the 1st Respondent failed to consider the proper evidence or that the decision is patently unreasonable: see Lord Greene M.R. in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 K.B. 223** at 233-4:

> *"... 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, conversely, 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."*

30 In **Frank Renard Moxam v Central Planning Authority and A.L. Thompson Jr** (11 June 2002), a decision of this Tribunal, the application of the Wednesbury test in appeals of this nature was confirmed, by the Tribunal when directing itself as to the issue of unreasonableness first by referring to the following remarks made in the earlier decision of **National Trust and Adams v CPA** (July 2001) at p. 8:

> *"... unless this tribunal is able to conclude that the decision of the CPA Is so unreasonable that no reasonable body could ever come to it or that it took into account matters which it should not have taken into account or conversely failed to take into account matters that it ought to take into account then it cannot properly be set aside."*

31 And secondly, the tribunal reminding itself of the passage in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223** at 230 where Lord Greene said this on the issue of unreasonableness:

> "It is true to say that, if a decision on a competent matter is so **unreasonable that no reasonable authority could ever have come to it, then the courts can interfere**. That, I think, is quite right; but to prove a case of that kind would require something **overwhelming** and, in this case, the facts do not come anywhere near anything of that kind." (Emphasis added)

32 There is nothing before the Tribunal which indicates that the no reasonable authority could ever have decided as the 1st Respondent did, further, there are no facts whether overwhelming or not which indicates that the 1st Respondent's decision was unreasonable.

33 The 1st Respondent gave due consideration to all the material before it and all the representations made and therefore arrived at a reasonable decision in the circumstances.

34 Having regard to the above, the 1st Respondent's decision was not arrived at by an unreasonable means by taking into account extraneous material. On the contrary, as the 1st Respondent is mandated to review all applications for development and in that review, the 1st Respondent has the sole discretion to approve or refuse permission, once the decision was arrived at by reasonable means, based on all the relevant material considerations, of which the effect of the permission on the private right of way is a valid material consideration which was taken into account by the Respondent.

34 **<u>Ground 3: Decision at Variance with the Development Plan</u>**

The Appellants under this ground assert in summary as follows:

a) Failing to properly apply provision 3.04(a) of the Development Plan
b) Failing to properly apply provision 3.04(c) of the Development Plan
c) Failing to properly apply provision 3.04(f) of the Development Plan

d) Failing to performing or evaluating whether the development will maintain or enhance the quality of life in the Cayman Islands.

35 In response the 1st Respondent stated that it did not fail to apply section 3.04(a) of the Development Plan. The 1st Respondent is to operate in a manner best calculated to provide for the orderly development, expansion and upgrading of facilities required to maintain a successful tourism industry. The plans as submitted by the 2nd Respondent are a clear demonstration of the development and expansion and upgrading of the tourism product as the plans are for a tourism product in Bodden Town where no hotel currently exists.

36 The 1st Respondent did not fail to apply section 3.04(c) of the Development Plan. The 1st Respondent is to operate in a manner best calculated to prevent overdevelopment of sites and to ensure that the scale and density of the development are compatible with and sensitive to the physical characteristics of the site. Contrary to the Appellants' submission the proposed development is not too dense of the site.

37 The dimension of the site is approximately 48.53 Acres (2,113,966.8 sq. feet) the total footprint is proposed to be 416,960.00 sq. feet[5] which is far less than a 40% density of the complete site. Therefore, it is clear than the density of the development relative to the complete site is compatible with and sensitive to the physical characteristics of the site.

38 The 1st Respondent did not fail to apply section 3.04(f) of the Development Plan. The 1st Respondent is to operate in a manner best calculated to ensure adequate allowance for public access to the sea. The plan exhibit Figure 1A (of the Record) illustrates that the plan contemplates the provision of a new beach access to the eastern end of the property which currently has no direct access to the beach. This new beach access clearly ensures adequate access as required by section 3.04(f).

[5] See Figure 1 of the exhibits

39 Finally, the general aim of the Development Plan is to maintain and enhance the quality of life in the Cayman Islands by effectively directing Development, not to perform any evaluation of whether the development will serve to maintain and enhance the quality of life.

40 The aim is that by effectively directing development to safeguard the economic, cultural, social and general welfare of the people subject to the environment, this will lead to the maintenance and enhancement of the quality of life in the Cayman Islands. The 1st Respondent submits that it is seeking to direct the proposed development to safeguard the economic, cultural, social and general welfare of the people subject to the environment which will inevitably lead to the maintenance and enhancement of the quality of life in the Cayman Islands.

41 For the reasons set out above, we do not consider that there is any proper basis for interfering with the decision of the 1st Respondent. There is no lawful ground on which the Tribunal may properly reverse or modify the decision of the 1st Respondent, and there is no sound basis for remitting the matter for reconsideration and rehearing. In all the circumstances, this appeal should be dismissed with costs being paid to the 1st Respondent."

42 **THE SUBMISSIONS OF THE 2nd RESPONDENT ("BBLL")**

From his written submissions as reproduced verbatim below the Second Respondent submits as follows:

"The Respondent Beach Bay Land Ltd. ("BBLL") says that this appeal should be dismissed for the following reasons.

43 **Procedural History**

BBLL applied[6] on May 6, 2019 for planning permission for a 9-storey (later 10-storey) resort hotel containing guest rooms, residences, and the usual

[6] Appeal Brief ("AB"), p. 1 ff.

amenities of a high-end vacation resort on Block 32D Parcels 313, 122, and 5; and Block 38E Parcel 282 (collectively, the "Development").

44 The Central Planning Authority ("CPA") considered the application for the first time on September 11, 2019.[7] Notices had been sent in the prescribed manner to nearby landowners and a number of objections were received.

45 Among the objectors were the two appellants, Cedar Valley Ltd. ("Cedar Valley") and Flamstead Ltd. ("Flamstead"), local companies owned and operated by John Broadbent ("Mr. Broadbent"). The two companies each submitted letters of objection dated June 3, 2019;[8] these letters are identical and make no distinction between the effects of the Development on Cedar Valley's land and on Flamstead's land.

46 The CPA decided to adjourn the application and require BBLL to submit revised plans that designated a 12' wide public access to the sea, adjusted the setbacks to comply fully with existing requirements, relocated the back-of-house facilities further away from existing residences, and increased the number of parking spaces.[9] These requirements reflect various complaints received from objectors. The CPA also directed that the objectors were to be re-notified so that they could submit fresh objections.

47 Mr. Broadbent, on behalf of his two companies, submitted fresh objections by email dated October 13, 2019.[10]

48 The adjourned application was heard on November 20, 2019. Some of the objectors attended but many did not. Mr. Broadbent did not attend but was represented by Will Steward and James Bovell.[11]

[7] AB, p. 780-1.
[8] AB, p. 489-494.
[9] AB, p. 780-1.
[10] AB, p. 412-413.
[11] AB, p. 803. Contrast this with Mr. Broadbent's recent argument that he would suffer significant prejudice if he could not attend the appeal in person rather than by video link.

49 The CPA granted approval for the application. The CPA's decision[12] ("Decision") was sent to all parties by letter dated December 3, 2019.

50 Notices of Appeal[13] pursuant to s. 48(1) of the *Development and Planning Law (2017 Revision)* ("Law") were then filed by 6 groups of objectors, including the appellants. Their notice of appeal contains no indication of their grounds of appeal.

51 The Appeal Brief was delivered to all parties to the appeal on or about December 31 2019.

52 All objectors except Cedar Valley and Flamstead have abandoned their appeals. In effect, just one individual – Mr. Broadbent – is still appealing.

53 Cedar Valley and Flamstead filed a 2-page document entitled "Memorandum of Grounds of Appeal and Form of Order" (referred to below as the "Memorandum of Grounds") on or about January 20, 2020. This document simply repeats the four available grounds found in s. 48(1) of the Law. It gives no further information at all to the respondents (or, for that matter, to the PAT) concerning what is at issue on this appeal.

54 By letter dated July 28, 2020 the PAT advised the appellants that they should file a Written Submission by August 21, 2020. They did not do so. Mr. Jackson, of Counsel to Cedar Valley and Flamstead, has asserted[14] that there is no requirement in law to file a Written Submission. One expects that he would have wished to do so if this appeal has any merit at all.

55 The result is that, as this Submission is written, BBLL's only information concerning what is actually in issue on this appeal is the knowledge that the

[12] AB, p. B-1 ff.
[13] AB, p. A1 ff.
[14] In his letter of August 20, 2020.

appellants have invoked all four of the available grounds. We will address each in turn.

Issues

56 The Memorandum of Grounds says that the Decision is "erroneous in law" but does not specify what legal error has been committed. The obligation to identify the error rests with the appellants.[15] Their failure to do so means this ground must fail.

57 The Memorandum of Grounds also alleges that the Decision is "contrary to the principles of natural justice. Nothing is said about how the principles of natural justice have been violated. Consequently, this ground must fail.

58 The Memorandum of Grounds also alleges that the Decision is "at variance with the development plan". The Property is zoned Hotel/Tourism, Zone 2.[16] No explanation of the alleged inconsistency with the development plan is identified. Consequently, this ground must fail.

59 Finally, the Memorandum of Grounds says that the Decision is "unreasonable". It does not say why. We proceed here on the assumption that the objections expressed by Mr. Broadbent in his email of Oct. 13/19 are still matters of contention.

Mr. Broadbent's Concerns

60 In essence, Mr. Broadbent's email expresses the following concerns:

1. the height of the buildings and overall scale of the Development;
2. the road network is not suitable, and cannot be made suitable, for the anticipated amount of traffic;
3. the risk of objectionable odours if the sewage system breaks down;
4. the suitability of the underpass, especially given that it will require blasting; and

[15] Fordham, M*; Judicial Review Handbook (5th edition*); para. 42.1.1.
[16] AB, p. B1.

5. the increase in traffic and noise (given the size of the Development) will be annoying to local residents.

Meaning of "Unreasonable"

61 What is meant by the word "unreasonable" in the context of a planning appeal or judicial review[17] was addressed briefly by Harre, CJ in *Cortina International Limited v Chairman of PAT and others*[18] when stating his conclusion in this way:

> *From all this I reach the following conclusions:*
>
> *1. …*
>
> *2. The decision was not, however unreasonable in that no reasonable Tribunal, properly directing itself, could have arrived at the decision to adjourn on the merits.* [underlining added]

62 The same controversial planning application was subsequently the subject of an appeal to Sanderson, J.[19] It was argued that the decision of the CPA, which agreed with the concerns of the objectors and refused planning permission, was unreasonable. In dismissing the appeal and affirming the decision of the CPA, he said:

> *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*

[17] With the exception of the reference to the development plan, the grounds of appeal in s. 48(1) of the Law are also traditional grounds for judicial review.
[18] 1998 CILR 249 (GC).
[19] *Cortina International Limited v PAT & CPA* 2000 CILR 360 (GC).

> *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.* [underlining added]

63 As the underlined passages demonstrate, the PAT must determine whether the CPA's Decision is so unreasonable that no reasonable Authority could have come to it. It would not be enough for the PAT to determine that, if the initial decision had been up to it rather than the CPA, it would have refused planning permission; that is too low a test. In other words, the PAT cannot simply substitute its own view of the merits of the objections for that of the CPA. Rather, it must ask itself whether any reasonable member of a planning board or tribunal could possibly reach the same decision arrived at by the CPA.

Is the Decision Unreasonable?

64 We address each of Mr. Broadbent's five objections in turn.

Scale

65 The overall scale of the Development, and in particular the height of the buildings, was a major focus of the hearing before the CPA. The CPA considered the objections surrounding the scale of the Development and concluded:[20]

> *a) As defined in the* Development and Planning Regulations (2018 Revision) *"massing" relates to the physical attributes of a development. The Authority is satisfied that the building height of ten (10) storeys or 113 feet, the building design, the incorporation of various architectural features and treatments, and the placement of the buildings in relation to the surrounding zoning and physical developments, is sufficiently compatible with the characteristics of the area.*
>
> *b) The project, as proposed, does not significantly alter the area's aesthetics or physical characteristics beyond that could* [sic] *reasonably be expected to occur given the zoning and character of the area.*

66 This represents a considered decision by the CPA of an issue containing substantial subjective elements. Mr. Broadbent disagrees with the Decision,

[20] AB, p. B-3.

and others may too, but it is not "unreasonable" simply because some people would have come to the opposite conclusion. Government has entrusted the members of the CPA with the responsibility of making such decisions. Its Decision cannot be set aside unless the appellants can show that the CPA has, in effect, abdicated its responsibility.

Roads

67 Concerning the suitability of the road network the CPA said:

> *c) The Authority accepts National Roads Authority's technical assessment that the traffic impact from the proposed development will be minimized upon construction of BP40 and is satisfied that the proposed road infrastructure will be adequate to accommodate the proposal.*

68 The National Roads Authority ("NRA") addressed this aspect of the Development in some detail.[21] After constructing a model of the anticipated traffic flow, the NRA concluded that the amount of traffic could be accommodated although, eventually, the existing road network would need to be enhanced by constructing Boundary Plan ("BP") 40 "or an alternative".[22]

69 Mr. Broadbent suggests that the BP 40 idea is "not realistic" but his comments are simply opinions, unsupported by any sort of traffic study or evidence from an expert. Predicting the impact of traffic is a technical subject. It is not unreasonable to prefer the evidence of the NRA experts over the opinions of a single objector.

Odour

70 When it rejected the initial application, the CPA required BBLL to relocate a number of facilities of the Development. BBLL did so. Concerning objections about odour, the CPA noted in its Decision that "*The wastewater treatment plan has been relocated further away from residential properties.*"[23] Mr.

[21] At AB, p. 349-352.
[22] AB, p. 351.
[23] AB, p. B-3.

Broadbent's objection is that, if the wastewater treatment system breaks down, "it will lead to unbearable odours".[24]

71 Whether bearable or not, the odours emanating from a broken treatment plant will no doubt be unpleasant. But the risk of a breakdown is present in similar facilities all over Grand Cayman. The CPA cannot have acted unreasonably by choosing to accept the same risk it has accepted previously in many other developments.

Underpass

72 Mr. Broadbent's objection to blasting in relation to an underpass is based upon a misconception. BBLL has advised the CPA that there will be no blasting.[25] In any case, the "underpass" is actually an overpass bridge requiring berms, etc.; it will be ripped by heavy equipment, not drilled and shot. There is no merit in this objection.

Increase in Traffic & Noise

73 The final objection is that the increase in traffic and noise, given the size of the Development, will be annoying to local residents. In response, the CPA said this:[26]

> *The Authority is satisfied that the proposal supports the character of the designated tourism product targeted for Lower Valley and Bodden Town and is comparable with newer hotel developments proposed throughout Grand Cayman in terms of massing, scale, aesthetics and on-site services provided. The Authority accepts the Department of Tourism's assessment that the proposed development will serve to enhance the quality and character of the Island's tourism and hospitality offerings.*
>
> *The Authority is satisfied that the scale and density of the proposed development is compatible with and sensitive to the physical characteristics of the site in terms of massing, scale, aesthetics and placement.*

[24] AB, p. 413.
[25] AB, p. 804.
[26] AB, p. B-2.

74 The tourism industry amounts to roughly half of the economy of the Cayman Islands. The Government is a party to the Development Agreement of September 3, 2015 and supports the Development. The land owned by Cedar Valley and Flamstead is itself zoned Hotel/Tourism and may well increase in value because of the Development.

75 The CPA was required to weigh the obvious advantages of the Development against whatever disruption it might cause in the local community. It has done so. Mere disagreement with its Decision does not render the Decision unreasonable. Clearly, it is a decision to which the CPA and its members, acting reasonably, could come."

Further Submissions of the Second Respondent after receiving the Written Submissions of the Appellants:

76 This is the response by Second Respondent Beach Bay Land Ltd. ("BBLL") to the Submission on behalf of the Appellants ("Appellants' Submission") dated September 7 2020.

"Appeal is not a Rehearing

77 This is an appeal upon the record and not a rehearing.[27] The distinction has been described in some detail in an oft-quoted UK decision[28] as follows:

> *5 An application under section 288* [i.e., a challenge to a planning permission] *is not an opportunity for a review of the planning merits of an inspector's decision. An allegation that an inspector's conclusion on the planning merits is Wednesbury perverse (see Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223) is, in principle, within the scope of a challenge under section 288, but the court must be astute to ensure that such challenges are not used as a*

[27] *Development and Planning Law (2017 Revision)* ("Law"), s. 48(1).
[28] *Newsmith Stainless Ltd. v Secretary of State for the Environment et al.* [2001] EWHC Admin 74, para. 5 to 7.

cloak for what is, in truth, a rerun of the arguments on the planning merits.

6 In any case, where an expert tribunal is the fact-finding body the threshold of Wednesbury unreasonableness is a difficult obstacle for an applicant to surmount. That difficulty is greatly increased in most planning cases because the inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments. For example: is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport etc? Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable.

7 Moreover, the inspector's conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing, or contained in written representations but, and this will often be of crucial importance, upon the impressions received on the site inspection. Against this background an applicant alleging an inspector has reached a Wednesbury unreasonable conclusion on matters of planning judgment faces a particularly daunting task. It might be thought that the basic principles set out above are so well known that they do not need restating. But the claimant's challenge in the present case, although couched in terms of Wednesbury unreasonableness, is, in truth, a frontal assault upon the inspector's conclusions on the planning merits of this Green Belt case. [underlining added]

78 For the most part, this appeal takes the same illegitimate approach: although couched as an inquiry into "reasonableness", it is really an improper invitation to retry the merits of the original application.

79 In some instances, the objections expressed in the Appellants' Submission were not objections advanced by the Appellants before the Central Planning Authority ("CPA") but are new points of contention, as is described in more detail below.

80 There is no established rule preventing an objector from advancing a new objection on appeal,[29] but the Planning Appeals Tribunal ("PAT") would be entirely justified in giving less weight to such belated objections. The right of

[29] Fordham, M.; *Judicial Review Handbook*, 5th edition; para. 31.4.11 but see para. 31.4.1; and see *Newsmith*, *op. cit.*

appeal is given (in s. 48(1) of the Law) to a person who is "aggrieved by a decision" of the CPA; one can hardly be aggrieved by a decision that fails to address, or to address fully, a point that was never advanced at the hearing. At a minimum, it is impossible to draw the inference that, had the objection been made to the CPA, that body would not have had a satisfactory answer to it.

81 Moreover, the taking of a point for the first time on appeal suggests that it has never been a pressing concern of the party advancing it. It is not unreasonable to expect that Mr. Broadbent on behalf of the Appellant, who has had legal training, would express all of his objections to the CPA at the outset. By raising new points for the first time on appeal, he is either trying some new way of thwarting the subject Development or seeking an illegitimate tactical advantage by failing to disclose until late in the process, what is truly in issue on the appeal. Either alternative would justify viewing his objections with skepticism.

Planning as a Multi-Stage Process

82 Much of the Appellants' Submission reflects a failure to understand, or an unwillingness to acknowledge, the fact that planning is handled by a process that advances in stages. A developer first seeks the consent of the CPA to the proposed development. The various concerned regulatory authorities are consulted and provide their views. If the CPA grants planning permission it invariably imposes conditions that among other things reflects feedback it has received from these agencies. It is then the developer's task to perform and otherwise comply with the specified conditions. Once that has been accomplished, the developer may apply for a building permit.

83 It follows that some questions will not yet have been addressed by agencies such as the Water Authority or the Fire Department. There is nothing unusual or "irrational" about that; it is how the system is intended to operate. It is during the second phase of the process, after the grant of planning

permission but before the application for or the granting of a building permit, that the developer must satisfy these various regulatory agencies and obtain their approval or otherwise demonstrate compliance with the consent conditions. Planning is a multi-stage process, and this fact alone is a complete answer to many of the Appellants' concerns.

Beach Access

84 The first objection advanced by the Appellants on this appeal is that, having approximately 2,000 feet of shoreline, BBLL must set aside at least 60 feet of land for a right of way from the public road to the sea but allegedly has not done so. That is a requirement found in s. 32 of the *Development and Planning Regulations (2018 Revision)*. The Appellants characterise this as a point of law but it is really just a question of fact: has the beach access requirement been addressed properly? The objection was never made by the Appellants at the hearing before the CPA.[30]

85 This objection seems to be based upon a misunderstanding of the proposal. In fact, 60 feet of right-of-way has been set aside as shoreline access, as is illustrated on the attached plan. This land adjoins the public road and includes an additional 12-foot wide strip that is also set aside for public access

Traffic and BP40

86 The NRA has said that, although it can "endorse" the proposal, BBLL will need to enter into a new agreement with Government before construction can proceed. The Appellants' position is that it is irrational to grant planning consent on this basis because it is based upon an "assumption" that the BP40 roadway would be built. However, roadworks fall outside the remit of the Department of Planning and so the failure to obtain NRA agreement is simply immaterial.

[30] The Appellants' 2-page email containing their objections is at pp. 412-413.

87 The Appellants also assert that a roundabout would need to be built on additional private land not owned by BBLL but that is simply incorrect: BBLL owns the private land.

Wastewater

88 The Appellants complain that it was irrational to grant planning permission because the Water Authority said that the information submitted is "inadequate" for it to approve of the wastewater treatment system. Before a building permit is issued, the Water Authority's approval will be required. BBLL will submit additional information sufficient for that approval to be granted.

Fire Department

89 This objection was not made by the Appellants at the CPA hearing. The Appellants say that it was unreasonable to approve the application in the absence of input from the Fire Department in regard to fire access lanes, etc. It is entirely within CPA's remit to grant planning consent and to rely upon feedback from the Fire Department to be received in due course. A building permit will not be issued without that Fire Department approval.

DOE Concerns

90 This is another objection that the Appellants failed to advance at the CPA hearing. The DOE expressed concerns about building directly on the beach and recommended that villas and pathways be located off the beach because of an expected adverse impact on turtles. The CPA found that:

> *The Authority is satisfied the development will not interfere with natural coastal processes as it will be suitably setback from the high-water mark and accepts the technical assessment of the National Conservation Council.*

The Appellants claim that this conclusion was unreasonable because the NCC did not say that the development will not interfere with natural coastal processes.

91 The CPA clearly gave serious thought to the turtle issue. It imposed a condition requiring "turtle friendly lighting"[31] and a requirement that, before site works commence, the DOE must confirm that there are no turtle nests on the site that may be affected adversely.[32]

92 Although couching their objection as a question of reasonableness, the Appellants are really seeking a rehearing on the merits that would give them a forum for arguing that the possible impact on turtle nesting should outweigh the economic benefits of the Development. In essence, they are claiming the Decision to be unreasonable because they disagree with it. The CPA has been given the power by Government to make planning decisions which will necessarily involve some controversial environmental questions. It has considered the setback question and come to a decision with which the Appellants disagree but which is within the realm of reasonableness.

Development Plan and Character of the Surrounding Area

93 BBLL's reply to the Appellants' next objection – that the Development is not in keeping with the ecological, aesthetic, and physical characteristics of the site and surrounding area – is of the same type. These are subjective considerations about which people, all of whom are acting reasonably, may disagree. The CPA members have been appointed by Government to make these decisions. This objection is an invitation to engage in a re-hearing of the question but the PAT has no jurisdiction to do so.

94 The Development site is zoned Hotel/Tourism, Zone 2. That is the appropriate zoning for a large, high-rise hotel resort complex. Mr. Broadbent's has condoned the Appellants' property having been zoned Hotel/Tourism, Zone 2, so he can hardly object to a neighbour's plan to build a 10-storey hotel.

[31] Condition no. 2.
[32] Condition no. 11.

Conclusion

95 In conclusion, we say that this appeal is no more than a rather desperate attempt to stop the Development by engaging in a retrial of issues that the CPA, not the PAT, has the jurisdiction to determine. Moreover, several of the objections arise from an apparent misunderstanding of the planning consent process."

THE LAW.

96 **Adjournments by a Tribunal**

Cortina International Limited (trading as Cortina Villas v. Chairman of Planning Appeals Tribunal and eight others [1998 CILR 249]

"Lord Denning, M.R. having restated the elementary principle of natural justice that everything should be done fairly and that any party or objector should be given a fair opportunity of being heard said this [1978 3 All E.R.at 86:

In every case it is simply a matter of being fair to those concerned. Sometimes a refusal of an adjournment is unfair, but quite often it is fair. It depends on the circumstances of each particular case. But I would only say this: there is a distinction between an administrative enquiry and judicial proceedings before a court. An administrative enquiry has to be arranged long beforehand. There are many objectors to consider as well as the proponents of the plan. It is a serious matter to put all arrangements aside on the application out of many. The proper way to deal with it, if called upon to do so, is to continue with the inquiry and hear all the representatives present; and then if one objector is unavoidably absent, to hear his objections on a later day when he can be there."

Harre,C.J stated at 255: Conditions in the Cayman Islands and the facts of this case are not the same. Leaving procedural issues aside, one may agree or disagree with the decision of the Chairman. But the arguments against it fall far short of showing irregularity of the kind need to satisfy the test of irrationality propounded in *Council of Civil Service Unions v. Minister for Civil Service:* [1985] A.C. 374

and:

"While, as a matter of purposive construction and common sense, it would be open to the Chairman to take a purely administrative decision (including,

e.g.an adjournment by consent) without calling a meeting of the Tribunal, it was illegal and procedurally improper in the present case where the plaintiff had made it clear that it might wish to be heard. It should not have been deprived of its right to be heard and be heard by a quorate tribunal. There was a reviewable procedural irregularity. The decision was not, however unreasonable in that no reasonable Tribunal, properly directing itself, could have arrived at the decision to adjourn on the merits."

97 **Natural Justice**

Cortina International Limited (trading as Cortina Villas) v. Planning Appeals Tribunal and Central Planning Authority; [2000 CILR 360] per Sanderson,J at 373

The authors of de Smith, Woolf and Jowell, Judicial Review of Administrative Action state (op.cit., para 9-018 at 441-442:

"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 he can prepare his answers. In order to protect his interests he must also be able 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, 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 dispatch of business; and the extent to which the applicant has been responsible for the circumstances leading to the request for the adjournment."

98 **Errors in Law**

Errors in law have been dealt with in the submissions by the 1st and 2nd Respondents in responding to the Appellants' submissions that an error in law occurred. This has also been addressed in the Conclusions reached by the Tribunal and shall not be reiterated here.

99 **The Development and Planning Law**

Section 5 of the Law provides as follows:

"5. (1) It is the duty of the Authority to secure consistency and continuity in the framing and execution of a comprehensive policy approved by the Cabinet with respect to the use and development of the land in the Islands to which this Law applies in accordance with the development plan for the Islands prepared in accordance with Part II or otherwise in operation by reason thereof."

Section 5 requires the Respondent when complying with its mandate to have regard to the development plan approved by the Legislative Assembly.

100 **The Development and Planning Regulations**

Regulation 5 of the Regulations provides as follows:

> "5. (1) The control of development, including buildings and subdivision of land, shall be in accordance with these Regulations and the development plan.
>
> (2) Notwithstanding the requirements of subregulation (1), the Authority may give permission for development deviating from these Regulations only as provided in the development plan.
>
> (3) These Regulations shall be read with and interpreted having regard to the development plan, provided that where there is a conflict between these Regulations and the Planning Statement for the Cayman Islands 1977, these Regulations shall prevail."

101 It is a settled position that a development plan is not to be slavishly adhered to, but the 1st Respondent has a duty to have regard to it. The Court of Session opined in **Simpson v. Edinburgh Corporation 1960 SC 313** as follows:

"The defenders have also a plea to the relevancy of the action. This plea has two aspects. In the first place, it is said that section 12 of the Act of 1947, taken with Regulation 8 of the Order of 1950, does not oblige the planning authority to adhere to the provisions of the development plan;

and, secondly, that, even if this is the result of the Act and Regulation, there are no relevant averments that the grants of planning permission are contrary to the development plan.

Section 12, which has already been quoted, obliges the local authority, in dealing with applications for planning permission, to 'have regard to the provisions of the development plan so far as material thereto and to any other material considerations.' It was plan, to which I shall refer later, I should have been surprised to find an injunction on the planning authority to follow it implicitly, and I do not find anything in the Act to suggest that this was intended. If Parliament had intended the planning authority to adhere to the development plan, it would have been simple so to express it."

102 This Tribunal is also mindful of the advice of Sanderson, J. in *Cortina Villas v. P.A.T.* [2000] CLR 360, where he stated the following at p.372:

"I am guided by and adopt the following passages from de Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 5th ed., paras. 13–015 – 13–016, at 557 (1995):

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 manifestly 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 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."

and the arguments of Panton, J. in *Grand View Strata Corporation v.P.A.T. & Bronte Development Ltd.* unreported ruling dated 8 April 2016 at page 25, paras. 48-49 wherein he approved of the opinion in *Simpson v. Edinburgh* Corporation, supra.

103 **The Development Plan 1997**

Provision 3.04 of the Development Plan 1997 provides that:

"*The Authority shall apply the Hotel/Tourism Zone provisions and other relevant provisions of this Statement in a manner best calculated to -*
(a) provide for the orderly development, expansion and upgrading of facilities required to maintain a successful tourism industry;
(b) ensure that all development enhances the quality and character of the Cayman Islands' hotels and cottage colonies;
(c) prevent the over-development of sites and to ensure that the scale and density of development are compatible with and sensitive to the physical characteristics of the site;
(d) ensure minimal traffic impacts on surrounding properties and existing public roads;
(e) ensure that waterfront developments are designed to avoid interference with natural coastal processes; and
(f) ensure adequate allowance for public access to the sea.
The Authority shall take into consideration the characteristics of the form of tourist accommodation proposed and shall be satisfied that the layout, scale and massing of development are compatible with the ecological, aesthetics, and other physical characteristics of the site; and that a high quality of design and landscaping are used."

Provision 3.10 of the Development Plan 1997 provides that:

"Certain lengths of the coastline which have been identified as being of high landscape or scenic value forming a particularly attractive feature of the Island are designated as Scenic Coastline and will be subject to the following provisions:-

(1) The land will be conserved basically in its natural state,
(2) The ownership of the land will not be affected,
(3) Development which is consistent with the policies of this Statement will be permitted.

It will be the duty of the Authority to ensure that the open character of scenic coastline land is preserved, in particular, that of the beaches, and also to safeguard the public's right to use the beaches and to gain

access to them through public rights of way. The panoramic views and vistas provided by these coastlines are natural assets which are to be safeguarded for future generations"

104 **The Development and Planning Regulations (2020 Revision)**

Regulation 32:
In Hotel/Tourism zones, the Authority, when granting planning permission in relation to land which has a shoreline of two hundred feet or more in a development other than private single dwelling units, shall require the owner to set aside and dedicate to the public a right of way of not less than six feet in width per every two hundred feet, from the public road to the sea, on the subject property; and such right of way may be within the area set aside for setbacks under these Regulations.

Control of Development
Regulation 5(1): The control of development, including buildings and subdivisions of land, shall be in accordance with these Regulations and the development plan.

Regulation 5(2): Notwithstanding the requirements of subregulation (1), the Authority may give permission for development deviating from these Regulations only as provided in the development plan.

Regulation 5(3): These Regulations shall be read with and interpreted having regard to the development plan, providing that where there is a conflict between these Regulations and the Planning Statement for the Cayman Islands 1977, these Regulations shall prevail.

Scenic Shoreline
Regulation 20: It is the duty of the Authority to ensure that the open character od scenic shoreline land is preserved, in particular that of the beaches, and also to safeguard the public's right to use the beaches and to gain access to them through public rights of way.

Public Rights of Way

Regulation 32:

In Hotel/Tourism zones, the Authority, when granting planning permission in relation to land which has a shoreline of two hundred feet or more in a development other than private single dwelling units, shall require the owner to set aside and dedicate to the public a right of way of not less than six feet in width per every two hundred feet, from the public road to the sea, on the subject property; and such right of way may be within the area set aside for setbacks under these Regulations."

105 **Reasonableness**

Section **15** of the Law provides as follows:

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

106 In the well-known leading case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 K.B. 223 (2RP 4)* Lord Greene M.R. said (at 228):

"... The courts must always, I think, remember this: first, we are dealing with not a judicial act, but an executive act; secondly, the conditions which, under the exercise of that executive act, may be imposed are in terms, so far as language goes, but within the discretion of the local authority without limitation. Thirdly, the statute provides no appeal from the decision of the local authority. What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law."

A Tribunal has no jurisdiction to set aside a decision unless Appellants have demonstrated that the 1st Respondent failed to consider the proper evidence

or made a decision that was patently unreasonable: see Lord Greene M.R. in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 K.B. 223** at 233-4:

> *"... 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, conversely, 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."*

107 In *Frank Renard Moxam v Central Planning Authority and A.L. Thompson Jr* (11 June 2002), a decision of this Tribunal, the application of the Wednesbury test in appeals of this nature was confirmed, by the Tribunal when directing itself as to the issue of unreasonableness first by referring to the following remarks made in the earlier decision of *National Trust and Adams v CPA* (July 2001) at p. 8:

> *"... unless this tribunal is able to conclude that the decision of the CPA Is so unreasonable that no reasonable body could ever come to it or that it took into account matters which it should not have taken into account or conversely failed to take into account matters that it ought to take into account then it cannot properly be set aside."*

108 In *Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948]* 1 KB 223 at 230 Lord Greene said this on the issue of unreasonableness:

"It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming and, in this case, the facts do not come anywhere near anything of that kind."

109 **Appeal is not a Rehearing**

As stated by the 2nd Respondent this is an appeal upon the record and not a rehearing. The distinction has been described in some detail in an oft-quoted UK decision, *Newsmith Stainless Ltd v. Secretary of State for the Environment et al* [2001 EWHC Admin 74] para 5 to 7,as follows:

An application under section 288 [i.e., a challenge to a planning permission] *is not an opportunity for a review of the planning merits of an inspector's decision. An allegation that an inspector's conclusion on the planning merits is Wednesbury perverse (see Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223) is, in principle, within the scope of a challenge under section 288, but the court must be astute to ensure that such challenges are not used as a cloak for what is, in truth, a rerun of the arguments on the planning merits.*

In any case, where an expert tribunal is the fact-finding body the threshold of Wednesbury unreasonableness is a difficult obstacle for an applicant to surmount. That difficulty is greatly increased in most planning cases because the inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments. For example: is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport etc? Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable.

Moreover, the inspector's conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing, or contained in written representations but, and this will often be of crucial importance, upon the impressions received on the site inspection. Against this background an applicant alleging an inspector has reached a Wednesbury unreasonable conclusion on matters of planning judgment faces a particularly daunting task. It might be thought that the basic principles set out above are so well known that they do not

need restating. But the claimant's challenge in the present case, although couched in terms of Wednesbury unreasonableness, is, in truth, a frontal assault upon the inspector's conclusions on the planning merits of this Green Belt case.

CONCLUSIONS

110 This Tribunal has already addressed the issue of the adjournment and the law relating thereto. It determined to deny the adjournment and proceed with the appeal.

111 This Tribunal is not prepared to accept the submission of the Appellants that the alleged failure to adhere to the provision of Regulation 32 of the Regulations is an error in law. Given Regulation 5(2) of the Regulations dealing with Control of Development the Authority may deviate from the Regulations only as provided in the Development Plan. Regulation 5(3) indicates that where there is a conflict between the Regulations and the Planning Statement for the Cayman Islands 1977 (superseded by the Development Plan 1997) the Regulations prevail. However, given that Regulation 5(2) permits deviation from the Regulations as provided in the Development Plan the Tribunal is of the view that Reg 5(2) effectively trumps Reg 5(3) as it allows the Authority to deviate from the Regulations in accordance with the Development Plan. The Development Plan in section 3.04 provision (f) indicates that the Authority shall apply the Hotel/Tourism Zone provisions in a manner best calculated to ensure "adequate allowance for public access to the sea". Considering that there is already a public roadway in addition to the 12ft right of way the Authority required in its decision it is determined that there is sufficient right of way to the sea for the public to utilise, constituting adequate allowance to the sea. Notwithstanding this, the 2nd Respondent has agreed to permit a 60ft right of way in its submissions and as set out in the map attached to those Submissions. Accordingly, there is no issue regarding public rights of way to support the appeal.

112 This Tribunal is not prepared to accept the Appellants' assertion that the Decision of the Authority is an unreasonable decision for the Authority to have made in the *Wednesbury* unreasonable sense nor was it arrived at on an improper basis. In determining this the Tribunal took note of the following facts:

a) There was an initial hearing with numerous objectors (34) who submitted letters of objection;
b) There was an additional hearing ordered and there were an additional number of Objectors' letters submitted;
c) A number of the Objectors were present at the adjourned hearing and their objections were made known by their representatives and themselves; they were given ample opportunity to present their concerns and were questioned by the Authority;

d) The Authority heard reports from the various regulatory authorities they sought advice from, and these reports were tabled and considered and recommendations made;

e) The Authority determined to grant the Application and provided detailed reasoning for its decision having considered all of the objectors' letters, the objectors in person, the reports from the various regulatory bodies, the required changes made by the Applicant and having set down a number of conditions required of the Applicant as a condition of the approval.

113 This Tribunal is not prepared to accept that the decision of the Authority was at variance with the Development Plan 1997. This Tribunal is minded to follow the advice of Sanderson, J. in *Cortina,* Lord Green in *Simpson,* the PAT in *Moxam* (all supra). The authorities are consistent in ruling that Development Plans are not to be slavishly adhered to.

114 The Tribunal is not prepared to accept that this development is out of keeping with the surrounding area. While it is not consistent with the single-family homes in the surrounding countryside, it is in keeping with the zoning which is Hotel/Tourism Zone 2. The zoning is there and it permits development of this nature to be constructed. It is to be noted as well that the development site is large by any standards applicable to local planning decisions and along the coastline and thus could be said to constitute its own area, especially when setbacks and the original zoning (discussed below) are considered.

115 The *Development Plan 1977* set out the relevant area along the coastline as being designated as Hotel/Tourism. This designation also included the lands of the Appellants. In 2014 the Legislative Assembly of the Cayman Islands approved the rezoning application and circulated approved amendments to the Development Plan 1997 whereby the relevant parcels were rezoned hotel/tourism which essentially expanded the hotel/tourism zone to include parcels 590 and 591 (now 282 and 283) entirely. The rezoning was applied for and carried out in accordance with s.11 of the Law and the proper notifications were advertised and the general public was invited to view the application for comment. No such comment was forthcoming from the Appellants.

116 Given that the Zone was created, and then expanded, the Government of the Cayman Islands has obviously determined that developments of this nature would be consistent with the *Development Plan* and specifically s.1.2, namely that the general aim of the Plan is to "maintain and enhance the quality of life in the Cayman Islands by effectively directing development so as to safeguard the economic, cultural, social and general welfare of the people and subject there to the environment" and further that "the primary objective of the Development Plan is to maintain and

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

117 This Tribunal does not accept that the omission of the Authority to condition its approval on the construction of the BP40 roadway and the roundabout is unreasonable; discussion of the roadway and the roundabout was fully ventilated at the Application hearing and the comments of the regulatory body were noted. Similarly, the Authority acknowledged that they had not yet heard from the Fire Department or the Water Authority. Nonetheless they considered the Application and concluded that it would be approved. They were within their authority to approve the Application and there is nothing to suggest that given all of the information they possessed, and the concerns brought before them, the decision that they reached was so patently unreasonable that no local authority properly constituted and directed could have reached it. They canvassed all matters which they ought to have taken into account, did not deal with matters that they ought not to have taken into account and did not refuse or neglect to take into account matters which they ought to take into account. This Tribunal is unable to conclude that the Authority came to a conclusion so unreasonable that no reasonable authority could have ever come to it: *Wednesbury* (supra)

118 As stated in *Newsmith* (supra) the Appellant's appeal is not an opportunity to review the merits of the planning decision and this Tribunal must be astute to assure that the appeal is not to be used as such. "The threshold of *Wednesbury* unreasonableness is a difficult obstacle for an applicant to surmount because the inspector [read Planner in Cayman] is not simply deciding questions of fact but is reaching a series of planning judgments, on which there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable."

119 While the Appellant has raised a number of concerns, this Tribunal is of the view that they were fully ventilated at the hearing of the Application by the Objectors and in the comments of the regulatory agencies commenting on the application. The Authority was entitled to determine the weight to be applied to the evidence before it. The Authority determined to approve the application as a development in keeping with zoning promulgated by the Cayman Islands Government, as a project of benefit to the people of the Cayman Islands as a whole, notwithstanding the concerns and objections of the landowners in the immediate surrounding area. They were entitled to do so.

RULING

120 The decision of this Tribunal is to dismiss the appeal and uphold the decision of the Authority with the modification agreed by the Second Respondent of granting a 60ft right of way to the sea as opposed to the 12ft right of way approved by the Authority.

COSTS.

121 There will be no order as to costs.

Dated at October 7 2020

Chairman

Peter A. Broadhurst