IN THE PLANNING APPEAL TRIBUNAL

IN THE MATTER OF SECTION 49(1) OF THE DEVELOPMENT & PLANNING LAW (2015 REVISION)

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE CENTRAL PLANNING AUTHORITY WHEREBY PLANNING PERMISSION WAS GRANTED WITH RESPECT TO REGISTRATION SECTION GEORGE TOWN COMMERCIAL BLOCK OPY, PARCELS 16 AND 190

BETWEEN:

(1) SHIREOAK LIMITED

(2) CHRISTOPHER D. JOHNSON in his capacity as Joint Executor of the Kenneth Spraggon Estate

Appellants

-AND-

(1) CENTRAL PLANNING AUTHORITY

(2) WATERFRONT CENTER LTD.

Respondents

JUDGEMENT

Appearances: Mr Kyle Broadhurst of Broadhurst LLC for the 1st and 2nd Appellant

Ms Marylin Brant of the Attorney General's Chambers for the 1st Respondent

Mr Samuel Jackson of JacksonLaw for the 2nd Respondent

INTRODUCTION

1. This is an appeal against the decision of the First Respondent on 29 March 2017, to grant retroactively the Second Respondent planning permission for a commercial building with restroom facilities and a 144 square foot cabana (the "Development") on Block OPY Parcels 16 and 190 (the "Property").

2. The historic background is set out in the Appellants' and Second Respondent's written submissions. In brief terms, on 21 January 2015 the First Respondent refused an application (the "Refusal") filed by the Second Respondent (the "First Application") for planning permission for various improvements to the Property.

3. On 30 January 2015, the Second Respondent submitted a second application for planning permission (the "Second Application") in respect of the Property, which was granted on 15 April 2015, (the "Approval"). On 1 May 2015, the Appellants appealed the Approval (the "First Appeal"). On 13 September 2016, the Planning Appeal Tribunal (the "PAT") quashed and set aside the Approval on the basis that the First Respondent erred in law.

4. On 17 January 2017, the First Respondent convened to hear an application from the Second Respondent (the "Modification Application"), which was adjourned sine die. On 7 February 2017, the Second Respondent filed another application to seek an 'after-the-fact' planning permission (the "Retroactive Application") for works that were carried out to the Property between 2015 and 2017 under the Approval quashed by the PAT following the First Appeal. On 29 March 2017, the Second Respondent granted the Retroactive Application planning permission (the "Decision").

5. On 5 April 2017, the Appellants filed a Notice of Appeal in relation to the Retroactive Application (the "Appeal"). On 5 October 2018, the PAT heard an application filed by the Appellants to adduce fresh evidence (the "Leave Hearing"). On 30 November 2018 the PAT ruled to proceed on the evidence comprising the Appeal brief. The Appeal was heard over the course of two days, on 9 October 2020 and 16 October 2020. The parties were notified that a PAT finding, and written reasons would follow. The decision and reasons are set out below.

SUBMISSIONS AND ANALYSIS

6. The grounds of the Appellants' complaints in respect of the Decision are that the Decision is:
   (a) erroneous in law;
   (b) at variance with the Development Plan 1997 (the "Development Plan") and
   (c) contrary to the principles of natural justice.

7. The written and oral submissions advanced by Mr Broadhurst for the Appellants do not distinguish the First and Second Appellant. It is determined for the purposes of this appeal, that counsel's submissions in this regard are submitted jointly on behalf of both Appellants.

Erroneous in Law

8. The Appellants' complaints in respect of this ground are two-fold, that the First Respondent erred in its failure to apply the Development and Planning Regulations (2015), (the "Regulations") and that it further erred in its approach to the Second Application to grant planning permission, which was overturned by the PAT.

Failure to comply with Regulations

Regulation 6(4)

9. Mr Broadhurst argues that Regulation 6(4)(c) requires the site plan submitted in support of an application for planning permission to show the front, rear, and side setbacks to enable the First Respondent to properly consider compliance with relevant setback requirements.

10. Mr Broadhurst refers to email correspondence from the Department of Planning (the "Department") to the Second Respondent dated 27 February 2017. The correspondence reveals that a planning officer informed the Second Respondent's agent that the setbacks must be shown on the site plan and be labelled accordingly.

11. Mr Broadhurst further submits that the site plan supporting the application did not show any of the setbacks required by regulation 6(4)(c), a deficiency, Mr Broadhurst asserts that, was raised by the Appellants in their letter of objection, as noted in page 167 of the Record of Appeal and at the hearing before the First Respondent.

12. The Appellants claim that despite the apparent deficiency, the First Respondent determined, in error, that the site plan correctly depicted the parcel boundaries and their dimensions. Mr Broadhurst also argues that the setbacks were "*graphically displayed by virtue of the building locations on a scale drawing which allows specific setbacks from various and all points of the buildings to be determined*". Counsel claims this is an error in law specifically where no such written setbacks had been depicted on the relevant site plan.

13. The Appellants submit that a plan drawn to a scale to infer a ratio indicated on the plan and to calculate the length using a scale rule to calculate setbacks is not what is required under Regulation 6(4). In other words, the setbacks must be clearly set out and identified by the Second Respondent in the manner as directed by the Department.

14. Counsel for the First Respondent, Ms Brandt and counsel for the Second Respondent, Mr Jackson submit that, despite the lack of depicted setback lines required under Regulation 6(4)(c), the simple indication of the existing structures and features on the scaled site plan submitted in support of the Retroactive Application, is sufficient to comply with Regulation 6(4).

15. Mr Jackson further submits that the Appellants are estopped from raising this issue on the basis that Mr Broadhurst was counsel of record at the time of the hearing before the First Respondent and failed to raise the issue. Mr Jackson sites the case of G.H.LTD. V. BOULD and PHYLISON LIMITED – 1994-94 CILR 361 and asserts the doctrine of *res judicature* to in support of the argument that the Appellants are barred from raising the issue of the setbacks now. We disagree.

16. In G.H.LTD.V. BOULD and PHYLISON LIMITED the appellant filed a counterclaimed for a declaration that its recession of a contract, based on a material non-disclosure, was valid. The Grand Court made the declaration and ordered the appellants to repay monies received, in relation to the contract, from respondent. The appellants filed a subsequent writ in claim of deceit in addition to damages. The respondent successfully applied to strike out the appellant's claim, which was upheld on appeal.

17. The key principles emanating from G.H.LTD. V. BOULD and PHYLISON LIMITED are that the doctrine of *res judicature* requires all parties to bring their whole case whenever a given matter is the subject of litigation or barred from doing so later and that the doctrine generally preclude a party to proceedings to raise issues which could have been raised in earlier proceedings. It is on the basis that the Court of Appeal ruled that the extent of the respondent's deceit became apparent during the initial proceedings and were barred sine the appellant had failed to advance a claim based on this fact. The court held that deceit was established in the earlier proceedings and the claim was therefore *res judicature*.

18. Mr Broadhurst denies a failure by the Appellants to raise the issue and, in his oral submissions, makes reference to B5 of the Appeal Record to refute this claim made by Mr Jackson. The relevant text from the passage is reproduced below:

> *"The Authority considers the objectors comments, both written and **verbal,** and is of the view that they do not raise grounds for refusing permission, more specifically…*
> *(c) the site plan does show the parcel boundaries and dimensions and setbacks are graphically displayed by virtue of the building locations on a scale drawing which allows specific setbacks from various and all points of the buildings to be determined."*
> (Emphasis supplied)

19. It is clear from the record that the issue was raised by the Respondents and considered by the First Respondent. In any event, the facts in the present case are dissimilar to the issues in G.H.LTD.V. BOULD and PHYLISON LIMITED. The appellants in the latter filed a second claim in

the Grand Court based on facts that were well established in the earlier proceeding. This is an appeal from the decision of the Central Planning Authority ("CPA") for us to consider adherence with the Regulations, namely regulation 6(4).

20. Mr Broadhurst now properly raises the issue as a ground of appeal and should not be deprived of this opportunity, unlike in G.H.LTD.V. BOULD and PHYLISON LIMITED where the appellant initially chose to plead the case in a specific way and sought to change the scope before the same tribunal having received, what it perceived to be, a unfavourable decision, despite its success.

21. Plainly, the site plan submitted is devoid of the requisite setback lines required by Regulation 6(4). The Regulation expressly states that that the site plan must show the front, rear and side setbacks. It is for these reason that we deem the First Respondent's departure from this requirement to be an error in law. We do not accept that there was any justifiable basis for the deviation of regulatory requirement prescribed by 6(4).

22. We further reject Mr Jackson's request to apply the principle of *res judicature* and bar the Appellants. As already noted, the complaint was raised by Mr Broadhurst on behalf of the Appellants before the First Respondent, as evident from the Record of Appeal.

Regulation 8(7)

23. The Appellants claims that the First Respondent erred in its failure to consider the requirement under Regulation 8(7) for solid waste storage to be set back a minimum of six feet from adjacent property boundaries. Ms Brandt and Mr Jackson rely on regulation 8(13) in support of the Decision, and assert that it grants discretion to the First Respondent to dispense with this requirement. We agree with the Respondents.

24. Regulation 8(7) provides that *"Solid waste storage areas shall be setback a minimum of six feet from adjacent property boundaries and shall be screened with vegetation and fencing*."

25. Regulation 8(13) states as follows:

> "*Notwithstanding subregulations (1), (2), (5), (7) and (9)...the Authority may grant planning permission to carry out development that does not comply with all or any of those provisions if the Authority is satisfied that –*
>
> *(a) the development is a Government-approved low cost housing programme;*
>
> *(b) there is sufficient reason to grant a variance and an exceptional circumstance exists, which may include the fact that-*
>
> *i. the characteristics of the proposed development are consistent with the character of the surrounding area;*
>
> *ii. unusual terrain characteristics limit the site's development potential; or*
>
> *iii. the proposal will not be materially detrimental to persons residing or working in the vicinity, to the adjacent property, to the neighbourhood, or to the public welfare;*
>
> *(c) the development is a planned area development pursuant to regulation 24(1); or*
>
> *(d) in the case of an application where lesser setbacks are proposed for a development or a lesser lot size is proposed for a development, the adjoining property owners have been notified of the application*."

26. Mr Broadhurst submits that the First Respondent erred by failing to make specific reference to Regulation 8(13). We do not see the merit in this line of reasoning. The First Respondent, in varying the setback, at page 185 of the Appeal Brief, stated as follows:

> "*The location of the garbage enclosure is acceptable as moving it closer to the road will detract from the visual appearance along a busy road and important tourist*

corridor. Further, one location or another will not affect the likelihood of overflowing trash and that is a matter, if it occurs, for the Department of Health to address."

27. It is clear from the above extract that the First Respondent considered the issue and gave, what it deemed, sufficient reasons for its decision. It is unnecessary for the First Respondent to reference the legislative discretion. The First Respondent exercised its discretion in the way it deemed fit, and it is not for this Tribunal to substitute the decision to vary the setback in this way, for its own.

Regulation 8(8)(b)

28. The Appellants further submits that the First Respondent's variance of the provisions of Regulation 8(8)(b) amounts to an error in law. Mr Broadhurst contends that the minimum twenty-foot requirement and six-foot side setback, as prescribed by Regulation 8(8)(b), is not met by the Second Respondent. In spite of this, and in the absence of consent from the neighbouring property to the south, Mr Broadhurst complains that the First Respondent resolved to grant planning permission.

29. In response to this criticism, Ms Brandt argues that regulation 8(8)(b) invests discretion to the First Respondent to vary the setback in the way that it did. Regulation (8(8)(b) states:

"(8) In Commercial zones and Industrial zones-

(b) the minimum road setbacks shall be twenty feet and the minimum side and rear setbacks shall be six feet, ***unless otherwise specified by the Authority*** (Emphasis added).

30. Mr Jackson adopts a similar response relies on the discretion within Regulation 8(8)(b). Mr Jackson further argues that the First Respondent gives adequate reasons to justify the use of the discretion, which he asserts is consistent with section 2.6 of the Development Plan. Section 2.6 states:

"*The provisions for development setbacks are for achieving the following purposes:*

(a) To provide adequate natural light, ventilation and privacy to all buildings;

(b) To provide amenity space and to facilitate landscaping around the building;

(c) To maintain and enhance the quality and character of the development fronting a road;

(d) To provide a buffer between buildings on neighbouring lots; and

(e) *To avoid or minimize any negative impact the development or use of one lot may have on the occupants of a neighbouring lot*."

31. In arriving at its decision to vary the setback in this regard, the First Respondent states, on page 183, paragraph 5 of the Appeal Record:

"Pursuant to Regulation 8(8)(b) of the Development and Planning Regulations (2015 revision), the Authority deems the minimum setback as shown in the submitted plans to be sufficient for the development and that they were not materially detrimental to persons residing or working in the vicinity, to the adjacent property, to the neighborhood, or to the public welfare. In this regard, the Authority considered the objectors comments and determined that they failed to demonstrate how the application would be materially detrimental to their interest. Finally, the setbacks are consistent with the provisions of Section 2.6 of the Development Plan, 1997, which is addressed in more detail above in item 2."

32. There can be no dispute as to whether Regulation 8(8)(b) grants discretion to the First Respondent to vary the setback in relation to commercial zones and industrial zones. This applies to the Retroactive Decision. The First Respondent makes it clear its consideration of the recommendations of the relevant agencies and departed from them only where it saw fit.

33. Justice Panton in Grand View Strata Corporation v. The Planning Appeals Tribunal (Grand Court 8 April 2016) in dealing with a similar complaint said this at page 7:

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

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

34. We do not see it appropriate to disturb the First Respondent's decision in this regard in substitute of our own. The First Respondent had the benefit of assessing the evidence that was before it in a way that we have, not and is better placed to make a determination whether to dispense its discretion. In this case, it chose not to, and we see no need to interfere.

35. Separately, we do not see any validity in the argument advanced by the Appellants in relation to the reverse burden claimed to have been unfairly applied by the First Respondent. The comments made by the First Respondent do nothing more than confirm that it was not persuaded by the arguments advanced by the Appellant. What is clear is that the discretion to vary the setbacks does exist and that it was duly applied and underpinned by what the First Respondent deems to be, adequate reasons.

36. Mr Broadhurst submits that the First Respondent referred to the minimum setbacks but that no such setbacks were in fact shown on the site plan submitted in support of the Retroactive Decision. Mr Broadhurst argues that the First Respondent erred in the decision to determine the setback variances without proper evidence before it. As we have already stated at paragraph 21 above, there is no discretion for the First Respondent to deviate from the express requirements under regulation 6(4) and to do otherwise results in an error in law.

Regulation 8(8)(c)

37. Mr Broadhurst submits that the First Respondent erred in relation to Regulation 8(8)(c) in permitting, what he claims to be, parking within the road setback. More specifically, the Appellants allege that the First Respondent erred in its refusal to consider relevant evidence that refutes the finding that the parking lot existed for many years, that it failed to consider the danger of the parking lot, the adverse effect of the cross walk, a seemingly mistaken belief that the prior existence of the parking lot negated the need for careful consideration and the failure to consider the six-foot setback believed to exist, was in fact a sidewalk.

38. In response to the Appellants' contention, Ms Brandt suggests that the Appellants are misguided in their assertion on the basis that it inconsistent with the Record of Appeal. The First Respondent argues that the parking lot was granted planning permission based on the evidence presented by the Department, which displayed the parking lot within the six-foot set back.

39. Mr Jackson seeks to dismiss Mr Broadhurst's submissions in this regard as irrelevant. He argues that the Retroactive Application is restricted to an office, restroom and cabana. He claims both the seawall and parking area preceded the Development and Planning Law (2015 Revision) (the "Law") and do not form part of the proceedings for the First Respondent to consider. With regards to the commentary expressed by the First Respondent in this regard, Mr Jackson stated these were merely instructive in nature and immaterial.

40. The First Respondent on page 190 at paragraph 8(b) sates the following in relation to the complains raised by the Appellants:

> *"B) In regard to the comments of the National Road Authority:*
>
> - *Reference is made to the existing pedestrian crosswalk causing conflict with pedestrian and vehicular movements and it seems there is a suggestion that the development of the subject site will exacerbate this conflict. The Authority cannot accept this argument as it is the very same NRA that has place the crosswalk in this*

location knowing that there was an existing parking area on the subject site and in fact it was larger. The NRA cannot now argue that their action and any resultant problems from that action must now be the burden of a land owner wishing to develop their land in accordance with the Development and Planning Law and Regulations.

- *Reference is made to the design of the parking area causing problems with traffic flow. The Authority is of the view that this parking design has existed for many years and in fact that applicant has reduced the size of the parking areas from its original size. The Authority accepts the parking design as being functional.*

- *In terms of storm water management, a condition of approval has been imposed requiring the submission of a storm water management plan that must be reviewed by the NRA and approved by the CPA."*

41. We disagree with Mr Broadhurst's assertion that the First Respondent failed to consider the issue. The above extract from Reasons confirms the opposite. The First Respondent is permitted to rule in the way it has, and we accept the explanation given in relation to the comments received from the National Road Authority ("NRA").

42. With regards to the complaints in relation to the timing of the construction of the parking lot, we agree with Mr Jacksons, based on contents of the major application form (the "Application Form") from the Appeal Record that the parking lot was a preexisting development. We dismiss the Appellants' submissions in this regard.

Regulation 8(9)

43. Mr Broadhurst submits that the First Respondent acted contrary to regulation 8(9) by permitting the Retroactive Application for a parcel area which is below twenty thousand square feet. In particular, Mr Broadhurst condemns the paragraph below which, he asserts, is wrong as a matter of law based on the lack of distinction between old and new lots in regulation 8(9):

"It is the view of the Authority that regulation 8(9) of the Development and Planning Regulations applies only to the subdivision of new lots in a commercial or industrial zone, to apply this regulation otherwise would render many existing and viable parcels of land undevelopable and that cannot be the intent of the regulation."

44. Ms Brandt invites us to interpret regulation 8(9), which, in part, states:

> "*After the **6th May, 2002,** the minimum lot size in a Commercial zone or Industrial zone shall be twenty thousand square feet.*" (Emphasis supplied)

45. Ms Brandt contends that regulation 8(9) excludes commercial lots that existed prior to 2002. Mr Jackson makes similar submissions and argues that the legislative intent must be to exempt this requirement from parcels that existed prior to 2002.

46. Ms Brandt further states that since the relevant parcel was created prior to 1972, the First Respondent is correct to reject the Appellants' submission on the basis that Regulation 8(9) applies only to parcels created after 2002.

47. We agree with Ms Brandt and Mr Jackson. The intent of the Regulation is clear and given that the parcel was created before 6th May, 2002, the Appeal Record reveals that the First Respondent considered the issue and has provided, what it deems sufficient reasons, for its decision. The First Responded states on page 186 at paragraph 9(f) of the Appeal Record that:

> "*It is the view of the Authority that Regulation 8(9) of the Development and Planning Regulations applies only to the subdivision of new lots in a commercial or industrial zone, to apply the regulation otherwise would render many existing and viable parcels of land undevelopable and that cannot be the intent of the regulation*."

48. It is on this basis that we do not see it appropriate to disturb the First Respondent's decision in this regard.

Regulation 8(10)(a)

49. Mr Broadhurst submits that the First Respondent erred by granting the Retroactive Application planning permission despite acknowledging that the setback from the high watermark is less than the 75 feet, as required by regulation 8(10)(a). Mr Broadhurst argues that the First Respondent erred in the following ways, by coming to a decision without all the evidence, its failure to consider the evidence and objections raised, placing improper reliance on adjacent developments absent of any justifiable reasons, its failure to take into account the historic use of the properties and its failure to consider evidence before it that suggested improper use beyond the beach ridge.

50. Ms Brandt relies on Regulation 8(11) and asserts that the First Respondent has discretion to vary the setback specified in Regulation 8(10)(a). She further asserts that the First Respondent duly weighed the relevant factors and properly exercised its decision in the way it did. It is on this basis that Ms Brandt invites us not to interfere with the decision to vary the setbacks, except where unreasonable. She further argues that the complaint raised by the Appellants with regards to Regulation 8(10)(a) falls outside the scope of the Retroactive Decision and is, in any event, a matter of enforcement.

51. Mr Jackson's arguments mirror those of Ms Brandt with respect to the discretion prescribed by Regulation 8(11). Mr Jackson further asserts that the Appellants seek to rely upon matters such as the seawall and deck, that fall outside the descriptive scope of the Application Form and are irrelevant to the Retroactive Application. He further submits that the First Respondent has carefully considered all relevant factors, including the historic use of the parcel, despite what Mr Broadhurst asserts. We agree.

52. The First Respondent has the discretion to vary the setback as prescribed in Regulation 8(11) and exercised its discretion in the way it saw fit. The First Respondent has given detailed explanation for its decision to apply its discretion in the way that it has, as set out on pages 183 through 188 of the Appeal Record. We are not persuaded, based on the complaints advanced

by Mr Broadhurst, that the discretion was improperly utilised and dismiss the Appellants claims in this regard.

Development Plan

53. The Appellants assert that the First Respondent erred when it refused the First Application based on, as Mr Broadhurst claims, the Second Respondent's failure to comply with section 2.6 of the Development Plan. The core criticism in this regard is that the First Respondent seemingly reversed itself and approved the Retroactive Application despite there being no change to the setback requirements. In particular, the Appellants submit that the First Respondent erred in relation to sections 1.2, 1.3(d), (f), (g), (h), (i) and 2.6 (a), (b), (c), (d) and (e) of the Development Plan.

54. The Appellants further submit that an error in law occurred when the First Respondent misinterpreted the word "occupied" in relation to the Development Plan, by failing to give weight to the objections raised by the Appellants, and the failure to give proper weight to the objection made by the proprietors of the neighbouring parcel to the south of the Development.

55. Ms Brandt asserts that the First Respondent is properly entitled to rule in the way that it has and that no error has arisen. In effect, the First Respondent invites us to treat the previously overturned ruling as one that is a matter of semantics and not substance. Ms Brandt submits that the salient points for the earlier decision remained relevant and properly influenced the ruling in relation to the Retroactive Application.

56. Ms Brandt also draws distinction in relation to the shoreline modification and argues that it has no bearing on the Retroactive Application.

57. Mr Jackson submits, *inter alia*, arguments that run parallel to Ms Brandt's submissions Mr Jackson asserts that the previously submitted application differed substantially in nature from the Retroactive Application and argues that even if the applications were not dissimilar, the First Respondent is not bound by its previous decision.

58. In blunt terms, Mr Jackson argues that the Appellants are wrong in their assertion that the First Respondent failed to have proper regard to section 2.6 of the Development Plan. He refers to paragraphs 2 and 5 of the reasons for the decision (the "Reasons") on pages B2 and B4 of Appeal Record, as evidence to the contrary.

59. Mr Jackson further contends that the Appellants' submission in relation to the criticism of the First Respondent's reference or use of the word "occupants" is misguided in that, the term has no statutory definition and should be given its ordinary meaning.

60. Mr Jackson rounds out his submissions with reference to the objective set out in section 1.3 of the Development Plan and confirms that the Retroactive Application relates specifically to the use of and benefit to tourists in the George Town area.

61. The Appeal Record shows that the First Respondent considered the concerns raised on behalf of the Appellants in relation to section 2.6 of the Development Plan. Paragraph 2 of the Reasons refers specifically to section 2.6 of the Development Plan and the reasons the First Respondent felt the Second Respondent was compliant.

62. With specific regards to the complaint that the First Respondent approved an application that was largely similar to the previously rejected First Application, we accept the submissions made by Mr Jackson as set out in paragraph 51 of his written submissions. The Retroactive Application was not identical to the First Application.

63. The First Application is more extensive and includes a ticket and officer with trellis, restroom facilities, storage buildings, tour operator sales areas and mobile food truck parking space, whereas the Retroactive Application was restricted to an office, restroom and cabana. The First Respondent is properly entitled to consider the Retroactive Application afresh and in doing so, states the reasons it saw it fit for approval. We disagree with the submissions put forward by Mr Broadhurst in this regard and do not find a basis upon which to criticise the approach taken by the First Respondent.

Prior overturned decision

64. Mr Broadhurst levels criticisms against the First Respondent for what, he argues, is an error in law with regards to the approach taken with respect to the Approval on 15 April 2015 and the subsequent Retroactive Approval in 2017. Mr Broadhurst argues that the First Respondent erred by referring to the overturned Approval as a nullity and its failure to consider the Retroactive Application afresh.

65. Mr Broadhurst further asserts that the First Respondent erred in referring to the Second Application decision as a technicality rather than a nullity and suggests that the First Respondent should not have relied upon, nor referred to the previously overturned ruling and that in doing so, it erred in four ways. Paragraph 51 from Counsel's written submissions is set our below:

> *"The foregoing reveals four errors. First, the CPA has erroneously concluded that their prior decision was overturned "on a technicality", which was not the case. Second, that the CPA, in error, relied upon its findings on the merits from the prior decision despite the fact that that the decision was rendered a nullity by the decision of the PAT. Third, the CPA failed to consider the application afresh as it was required to do. Fourth, the CPA despite acknowledging the requirement for consistency with decisions and like applications, failed to properly consider that an identical application for the same property had been previously refused. The CPA instead impermissibly attempted to address that issue by relying upon the decision which had been set aside."*

66. Ms Brandt submits that the First Respondent is correct to characterise the overturned ruling as a technicality. She argues that the issue is merely one of semantics and that the material issue is that the First Respondent has taken the opportunity to affirm their reasons that remained unchanged at the time of the Retroactive Application and their decision to grant planning permission.

67. Mr Jackson goes a step further and suggests that the First Respondent considered the Retroactive Application afresh contrary to what the Appellants submit. He seeks to draw a distinction between, what he classifies as, the merits of the overturned application and the considerations of the First Respondent.

68. Mr Jackson highlights the contrast between a technicality and considerations that remained relevant to both sets of applications. He cited the case, R (on application of Chisnel) v. LB Richmond and Tom Dillon [2005] EWHC (Admin) in support of the assertion that consistent decisions do not require reasons.

69. We find the passage on page 6 Grand View Strata Corporation v. The Planning Appeals Tribunal (Grand Court 8 April 2016) instructive. In this case, although the learned Judge deemed the issue of an earlier decision to be irrelevant to the proceedings, he stated the following in relation to the consideration for previous decisions generally:

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

70. The Approval was overturned by the PAT on the basis that the Central Planning Authority ("CPA") erred in law by its reference to Regulation 8(13) and not Regulation (8(11) in its attempts to vary the setback. The matter was referred to the CPA for a fresh hearing, which resulted in the Retroactive Application being approved. Notwithstanding the comments made by the First Respondent as set out in paragraph 9(c) of the Reasons, the overall contents of the Reasons make clear that the Frist Respondent gave full consideration to the evidence before it. It is a fact that much of the evidence remained unchanged which, in our view, resulted in an entirely new decision, which is incidental to the previous. We see no basis for criticism.

Shoreline Modification

71. The Appellants assert that the First Respondent erred in law by failing to address a ramp that, it claims, forms part of the First Application. Mr Broadhurst complains that, contrary to what the First Respondent stated in its reasons, the ramp was built in connection with the Development and previously identified by the Department as requiring a shoreline modification. In effect, Mr Broadhurst claims that the ramp forms part of the Retroactive Application and that in failing to consider it, the First Respondent erred in law.

72. Ms Brandt submits that the Appellants are misguided in their assertion that the shoreline modification forms part of the Retroactive Application. She makes reference to page 187 of the Appeal Record in support of this proposition and asserts that the shoreline modification does not form part of the Retroactive Application and requires a separate permit.

73. Mr Jackson also seeks to dismiss the Appellants assertions as being irrelevant to this appeal. He, like Ms Brandt, submits that the Retroactive Application bares no reflection of a ramp or shoreline modification, reinforcing his earlier point made that the Retroactive Application is restricted to an office, restroom and cabana.

74. On page on page 191 at clause 9(j) of the Appeal Record, the First Respondent stated as follows:

> "*There is no shoreline modification and any works that may be undertaken on site without the grant of planning permission would be subject to the enforcement provisions of Section 18 of the Development and Planning Law*."

75. We agree with the First Respondent and form the view that shoreline modification requires a separate application in its own right. These are matters that fall outside the scope of the Retroactive Application and have no relation to it. We find no basis for criticism and reject the arguments put forward on behalf of the Appellants in this regard.

Consolidation

76. The Appellants submit that the First Respondent erred in granting planning permission despite receiving objections based on the Second Respondent's failure to combine the parcels comprising the Decision. Mr Broadhurst claims that the Law requires, with the exception of planned area developments, for planning permission only in relation to any one application and to single parcels.

77. With regards to the Appellants' complaint that approval was granted prior to the combination of parcels, Ms Brandt notes that this argument is not underpinned by any apparent law or legal principle. She suggests that the issue is purely a matter of practice and refers to the passage below from pages 185-186 of the Appeal Record, in support of the submission that the First Respondent did nothing improper and did not err in any way:

> *"It is standard practice to do the opposite of what the appellants are suggesting and if approval is granted, then the requisite conditions of approval are imposed that require multiple parcels to be combined and registered with one new parcel number. The relevant condition of approval has been imposed in this instance"*

78. Mr Jackson also notes the absence of any legal authority put forward by the Appellants in support of the notion that parcels must first be combined to qualify for approval. He refutes this assertion and submits that such requirement does not exist within the planning regime. Whereas Mr Jackson suggests that the First Respondent may require combination as a condition for granting planning permission, he disagrees that the requirement to combine parcel can be legally prescribed as a condition for permission.

79. Mr Jackson further argues that Mr Broadhurst fails to appreciate that the First Respondent specifies the combination of the parcels as a condition for the Decision. Mr Jackson refers to page B7 of the Appeal Record as evidence in this regard and invites us to dismiss this as "trivial and entirely irrelevant".

80. He states that the practice is entirely permissible on the basis that relevant properties are combined prior to the issue of a Certificate of Occupation. Reference is made to the Ritz Carlton and Camana Bay as notable examples that run contrary to what he deems, an "unfounded, illogical and baseless" argument advanced by the Appellants in this regard.

81. There is no requirement in law for parcels to be consolidated in the way Mr Broadhurst has proposed. We accept the submissions advanced by Ms Brandt and Mr Jackson. The First Respondent on page 185 of the Appeal Record states:

> "*There is reference to a previous meeting of the Authority pertaining to this application wherein the Authority indicated that an application can only be made with respect to one parcel. The Authority can find no record of such statement. Further, it is simply incorrect that parcels have to be combined prior to an application for planning permission being considered by the Authority."*

82. We have not been shown any previous reference by the First Respondent with respect to the need to combine parcels for the purposes of planning approval. In any event, the First Respondent made it clear that no such requirement exists and Mr Broadhurst has failed to establish otherwise. For these reasons, we dismiss the complaints in this regard and find that no error occurred.

Failure to consider relevant matters

83. Mr Broadhurst cites a number of factors he claims the First Respondent fails to take into consideration. He claims the failure to consider the following factors by the First Respondent renders the Decision either unreasonable or an error in law:

a) The First Application and the subsequent inconsistency arising;

b) Matters raised by the Department of Environment ("DOE") and National Conservation Council (the "Conservation Council") that reveals, what Mr Broadhurst submits to be, potential site inundation, structural damage caused by wave activity and the irreversible impact on the Marine Park as well as the overall vista of the area.

c) Concerns raised by the NRA as set out in a memorandum dated 27 February 2017 and rejection of these concerns;

d) Concerns from objectors with regards to non-compliance with side boundary setback requirements;

e) Various sections within the Development Plan and in particular, sections 1.2, 1.3(d), (f), (g), (h), (i) and 2.6 (a), (b), (c), (d) and (e);

f) Regulation 8(8)(c) and the fact that the parking apparently fell within the road setback;

g) Evidence relevant to its reliance on regulation 8(11);

h) Acknowledgement that the seawall was not a pre-existing structure;

i) The Retroactive Application was to have been subject to the Scenic Coastline overlay and, in breach of regulation 20, improperly excluded this crucial fact from its deliberations;

j) Acknowledgement that the development had already been constructed in the absence of planning permission and the need to enforce the Regulations more rigorously;

84. Ms Brandt on behalf of the First Respondent relies upon submissions earlier set out in the relevant paragraphs above and expands upon these points orally.

85. Mr Jackson, rebuffs the arguments made by the Appellants and cites various pieces of legislation and the extracts from the Appeal Record in support of the view that the First Respondent has not, in any way, err in law.

86. In relation to the likeness of the two applications, Mr Jackson asserts that, contrary to what the Appellants submit, they are not identical. He submits that the First Application goes beyond the scope of the Retroactive Application to include a ticket office with trellis, restroom facilities, storage building, tour operators' sales and mobile food trucks. Mr Jackson states that the only comparable applications are the latter two and that the First Respondent is well within its right to rule in the way it has.

87. The Reasons on page B2 of the Appeal Record is six pages. The First Respondent explains the reasons for the setback variations and the rationale with respect to the comments it received from the various agencies. The reasons specified are in direct response to the several issues raised by numerous objectors.

88. Much of the complaints advanced by Mr Broadhurst appears to recycle arguments he had already raised, albeit in a different format. There is nothing to suggest that the First Respondent failed to consider relevant matters. To borrow the words from Justice Panton's already noted above, the fact that the CPA did not agree with the Department does not mean there was no consideration.

89. With regard to the criticism advanced by Mr Broadhurst in relation to the nature of the two applications, we rely on the reasons set out paragraph 54 above and reject the arguments advanced. For reasons already explained, the applications are different and requires different consideration by the First Respondent separately. It would not be proper for us to trespass behind the reasons set out by the First Respondent in the Reasons for the Decision so as to substitute our own decision.

Failure to give reasons

90. Mr Broadhurst also criticises the First Respondent in relation to, what he claims to be, inadequate reasons. He cites Rule 4 of the Development and Planning (Appeal) Rules (the "Appeal Rules") and the decision of the Grand Court in Grand View Strata Corporation v. The

Planning Appeals Tribunal (Grand Court 8 April 2016) in support of this argument. Paragraph 60 of counsel's written submissions read as follows:

> "*While it is the Appellants' position that the CPA failed to address the matters set out in paragraph* ***Error! Reference source not found.*** *above, if in fact the CPA did consider any of those matters it failed to give reasons addressing them (or adequate reasons). Given the significance of those matters, the CPA's failure to provide adequate reasons is an error of law*"

91. Ms Brandt submits that the First Respondent has given more than sufficient reasons for the Decision so that the Appellants cannot not contend otherwise. She states as follows:

> *"The first respondent's reasons are set out in detailed and quite expansive terms at page B2 of the record of appeal under the head "Reasons for the Decision"*

92. Mr Jackson seeks to dismiss the Appellants' complaint in this regard as absurd. He cites various authorities in support of, what he submits to be, the settled principle that although reasons for decisions must be given, the First Respondent is not bound to refer to every point raised by the parties.

93. Mr Jackson refers us to the Reasons in the Appeal Record at pages B2-B7 and claims that there is no merit to the Appellants' complaint. He invites us to dismiss Mr Broadhurst's submissions on the basis that the Reasons are adequate and to rule that the First Respondent has not erred in the way Mr Broadhurst claims.

94. The First Respondent, in the Reasons has given a detailed explanation as to how it came to arrive at the Decision in relation to each specific objection raised. We note Mr Broadhurst's reference to the Grand Court decision in Grand View Strata Corporation v. The Planning Appeals Tribunal (Grand Court 8 April 2016) where the CPA failed to provide adequate reasons

for its decision to approve a ten-story building. However, the learned Judge also stated the following:

> " *I am not saying that the CPA is obliged to give reasons for all its decisions. Indeed, there is no requirement in the legislation for this to be done. In the instant case, it may well have very good reasons for its decision. However, given the intensity of the objections and the obviously informed comments of the Department of Planning, the CPA ought to have stated its reasons in respect of the aspect that I have just mentioned*."

95. In the instant case before us, we do not accept that the First Respondent failed to provide adequate reasons and find that that the contents of the Reasons sufficiently proves that adequate reasons were provided.

Breach of Natural Justice

96. Mr Broadhurst claims that the Appellants were deprived of a fair hearing when the First Respondent initially ruled to exclude new material but seemingly permitted the Second Respondent to submit new material at the hearing on 29 March 2017. He asserts that this resulted in a procedural breach and a breach of natural justice.

97. In effect, Mr Broadhurst submits that the First Respondent deprived the Appellants of a fair opportunity to grasp the new material and properly respond. Further complaints in this regard include an alleged failure to include relevant information and specifically, a memorandum from the department of environmental health ("DOE") and the Conservation Council in this regard.

98. Ms Brandt, in response to the claims of unfairness, submits that the First Respondent, by virtue of Schedule 1, paragraph 10 of the Development & Planning Law 2015 Revision, is permitted to regulate its own procedure. She further submits that the Second Respondent is duly authorised to read a letter. The letter, Ms Brandt argues, is an agenda item and can be properly

distinguished and based on information received from the secretary to the First Respondent, from material that is received after the agenda.

99. In any event, Ms Brandt submits that the only way the issue of this letter could be material was if we were satisfied that the First Respondent is unreasonable in permitting the letter to be read. Counsel cites leading case law authorities, which includes Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 and Moxam v Central Planning Authority and A.L. Thompson Jr (11 June 2002), to support the proposition that the First Respondent has not, in any way, err in this regard.

100. Mr Jackson denies that the Second Respondent submitted additional evidential material at the hearing, as alleged by the Appellants. Mr Jackson states that the information being referred to is a legal submission and not evidence. He further argues that the Appellants were given adequate opportunity to object to the material being read and is not affected since it is not unreasonable nor unfair for the First Respondent to consider this information.

101. We have considered the written and oral submissions advanced by Mr Broadhurst and can find no basis to conclude that the Appellants are deprived of a fair hearing. Mr Broadhurst's submissions are general and non-specific in nature. Ms Brandt and Mr Jackson argue that the First Respondent merely permitted submissions to be read that were distributed to Counsel prior to the hearing.

102. We see no issue with the approach taken by the First Respondent and fail to see the prejudice that arises to the Appellants. Page 181 of the Appeal Record reveals that Mr Broadhurst raised the issue as a primary concern and was given an explanation relative to the procedure for the acceptance of evidence after the publication of the agenda. We find that there is no procedural breach and that no breach of natural justice arises in the circumstances.

Conclusion

103. We find that the First Respondent erred for the reasons articulated at paragraph 16above in departing from the requirements stipulated in regulation 6(4), Development and Planning Regulations (2015 Revision). Save and except for this error in law, we see no other basis to criticise the First Respondent and reject the various arguments raised by Mr Broadhurst on behalf of the Appellants. The matter is remitted back to the CPA for rehearing.

104. No order as to costs.

Dated this 8th day of January 2021

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Chairman, Planning Appeals Tribunal