IN THE PLANNING APPEALS TRIBUNAL

IN THE MATTER OF SECTION 48 OF THE DEVELOPMENT & PLANNING ACT (2017 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, PARCEL 193

BETWEEN:

(1) SHIREOAK LIMITED **Appellant**

-AND-

(1) CENTRAL PLANNING AUTHORITY

Respondents

(2) WATERFRONT CENTRE LIMITED

JUDGEMENT

CORAM:

Richard Barton (Chair)

Nicholas Dacosta

Andrew Gibb

APPEARANCES:

Mr Kyle Broadhurst of Broadhurst LLC (Counsel for the Appellant)

Mr Nigel Gayle of the Attorney General's Chambers (Counsel for the 1st Respondent)

Ms Selina Tibbets of JacksonLaw (Counsel for the 2nd Respondent)

INTRODUCTION

1. This is an appeal against the decision of the First Respondent on 12 October 2020 (the "Decision"), to grant retroactively ("After-the-Fact") the Second Respondent planning permission for a concrete slab to be constructed on the ironshore (the "Development") on Block OPY Parcel 193 (the "Property").

2. By way of background, on 2 September 2020, the First Respondent heard an application (the "After-the-Fact Application") filed by the Second Respondent for approval of the Development. The First Respondent gave reasons for the Decision on the day of the hearing, which were later certified on 12 October 2020.

SUBMISSIONS AND ANALYSIS

3. The grounds of the Appellant's complaints in respect of the appeal are that the Decision is:
   (a) erroneous in law;
   (b) unreasonable; and
   (c) contrary to the principles of natural justice.

Erroneous in Law

4. The Appellant complains that the First Respondent erred in its failure to properly apply Regulation 8(10) of the Development and Planning Regulations (2020), (the "Regulations").

5. Mr Broadhurst argues that the First Respondent failed to consider all the relevant factors set out in Regulation 8(11) (a) – (f) and unlawfully exercised its discretion to vary the setback requirements for the concrete slab, based solely on the location of adjacent developments as prescribed by 8(11) (e). It is this aspect of the Decision that is being criticised:

> "*In this instance, the Authority is of the view that there are existing developments on the adjacent properties with similar setbacks*

from the highwater mark. Therefore, the setback of the proposed development is consistent with the established development character of the area, and it will not detract from the ability of the adjacent land owners from enjoying the amenity of their land."

6. Mr Gayle submits that the lack of specific reference to each factor listed in Regulation 8(11) (a) – (e) does not reflect a failure by the First Respondent to give due consideration to all factors. He contends that the First Respondent properly applied the discretion assigned by Regulation 8(11) and duly considered all relevant factors. Counsel further submitted that the First Respondent was well within its right to exercise its discretion and specifically identify Regulation 8(11)(e) as the basis for the Decision and to omit reference to factors deemed irrelevant for the purposes of the After-the-Fact Application.

7. Ms Tibbetts, on behalf of the Second Respondent, argues that the Appellant is misguided in the assertion that the First Respondent is required to expressly consider each factor under Regulation 8(11). Ms Tibbetts submits that the explicit reference to Regulations 8(10) and 8(11) in the Decision confirms that all factors were considered by the First Respondent. Counsel claims that it is rather difficult for the Appellant to suggest that all relevant factors were not considered and further noted that, in any event, not all factors were deemed applicable. Reference to a beach ridge was cited by illustration, which Ms Tibbetts suggests is irrelevant to the instant case.

8. We agree with the arguments advanced by counsel for the Respondents in relation to this aspect of the appeal. The Decision reveals that the First Respondent initially considered the primary issue of the minimum high water mark setback from the watermark, as evidenced by reference to Regulation 8(10). It then properly exercised the discretion provided by Regulation 8(11) and relied upon 8(11)(e) based on the location of the adjacent developments.

9. The relevant extract of the Decision at paragraph five above reveals 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 explicitly reference every factor set out in Regulation 8(11). 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 for its own.

Unreasonable

10. Counsel for the Appellant asserts that the First Respondent acted unreasonably by failing to consider relevant matters whilst giving undue weight to matters it ought not to have considered. A summary of both sets of complaints and the factors cited by Mr Broadhurst are set out below in the same order in which they appear within the written submissions filed on behalf of the Appellant.

Relevant Matters

11. Mr Broadhurst alleges that the First Respondent erred in its failure to consider the following:

(a) That planning permission for this application as a whole was under appeal and that the After-the-Fact Application should have been adjourned on the basis of the possibility of an adverse ruling, which counsel for the Appellant claims ultimately transpired.

12. We agree with the arguments advanced by counsel for the Respondents in their assertion that the After-the-Fact Application did not feature in the previous applications referred to by Mr Broadhurst, or at all. Further, the discretion to adjourn matters remains within the ambit of the First Respondent and it was not improper for the After-the-Fact Application to be considered separately. We do not accept that this is a position so unreasonable that no reasonable authority could ever have come to it.

(b) The concerns raised by the Planning Department (the "Department") in relation to the high water mark were not addressed.

13. Mr Gayle, on behalf of the First Respondent, argues that the there is no obligation to accept the recommendations made by the Department or any other agency for the relevant purpose.

14. Ms Tibbetts cites page 61 of the Appeal Brief to convey that the issue was fully ventilated at the hearing. We accept this line of reasoning and can see no justifiable basis to interfere with the Decision. The issue was clearly considered, and it is not for this tribunal to substitute its own decision simply because the decision to dispense with the recommendation made by the Department produced a ruling adverse to the Appellant.

(c) That a concern raised in relation to the justification for the concrete slab was not addressed.

15. Counsel for the Appellant contends, *inter alia*, that the First Respondent should have been required to justify the need for the concrete slab in light of concerns raised by the Department.

16. Mr Gayle argues that the First Respondent duly considered the issue and was satisfied as to the necessity of the concrete slab, as evidenced by the approval. Ms Tibbetts also rebuts this argument and claims that there is no stipulation under the Act or the Regulations for an applicant to justify the need for a development. Counsel for the Second Respondent asserts that the test is whether "*the development causes a demonstrable harm or recognized and material planning interest…*"

17. The process for planning approval is prescribed by virtue of the Act and Regulations. The Central Planning Authority ("CPA") is guided by this process in the determination as to

whether to grant or deny an application. We see no stipulation within this regime that imposes a duty on the applicant to "*justify*" the need for a particular application. This argument is artificial and cannot form a proper basis of appeal. The use or purpose of a development is a matter for the applicant entirely, provided it falls within the framework of the Act and Regulations, and it is not for the CPA to require its justification.

(d) That the Department raised concerns in relation to other works undertaken by the Appellant to the ironshore without approval.

18. Mr Broadhurst argues that the First Respondent should have considered the fact that additional works done to the ironshore went beyond the scope of the various applications. Counsel for the Appellant specifically asserts that the First Respondent ignored evidence of damage that resulted directly from the unauthorised works.

19. Counsel for the Respondents, in response to this contention, state that the First Respondent is not permitted to consider any works beyond the scope of the After-the-Fact Application. This would have caused the First Respondent to trespass into the area of irrelevant considerations and risk a decision deemed wrong in law. We find no basis for criticism in this regard. The First Respondent properly considered the narrow issues in relation to the concrete slab as it ought to have done.

(e) Whether or not a shoreline modification permit was required.

20. Mr Broadhurst claims that the Appellant raised the issue of the shoreline modification, which was not addressed by the First Respondent. Mr Gayle asserts that the consideration of this issue is self-evident from the Decision. Ms Tibbetts argues that there is no reference to the term "*shoreline modification*" either under the Act or Regulations. Counsel for the Second Respondent further asserts that, had the First Respondent considered this issue, it

would have erred based on an irrelevant consideration. We agree. There is no such concept and if there is, counsel for the Appellant failed to demonstrate this.

(f) All other factors cited, save and except for the adverse effect of the removal of the concrete slab raised by the Department.

21. Mr Broadhurst complains that the Decision is devoid of any consideration of all factors raised except for the recommendation by Department of Environment ("DoE") to leave the concrete slab in place rather than to remove it, based on the damage that would arise.

22. Mr Gayle claims that this assertion is unfounded and that the First Respondent clearly based the Decision on the need to maintain the consistency and characteristic of the adjacent properties, in addition to the adverse effects that would be associated with its removal.

23. Both counsel for the Respondents noted the increase in fees generally attached to an after-the-fact application and its intended punitive effect. Ms Tibbetts argues that any further differentiation by the First Respondent so as to draw a negative inference would create a bias.

24. We see no merit in this argument advanced on behalf of the Appellant. The First Respondent plainly cited the basis for the Decision by underscoring the adverse impact of the removal of the concrete slab, despite the unequivocal acknowledgement of the overall impact of the concrete slab itself, as evidenced by the passage from the Decision below:

> "***While discouraged with (sic) the after-the-fact nature of the slab****, the Authority concurs with the National Conservation Council (via comments from the Department of Environment) that the removal of the concrete slab will likely cause more environmental harm than leaving it in place*." (Our emphasis)

25. However, notwithstanding the reasons provided by the First Respondent, we are concerned that the above reason appears to conflate the issue of approval as distinct from that of enforcement. The issues are, in our view, quite separate and not mutually exclusive. Put another way, it is quite possible for the After-the-Fact Application to be denied and the issue of removal of the concrete slab remaining a matter of enforcement. This position was advanced by counsel for the Respondents, albeit in a different context, as noted in paragraph 19 above.

26. It appears the First Respondent confused the matter and felt compelled by the recommendation from the National Conservation Council (the "NCC"). The words emphasised above prove instructive. For this reason, we find that the First Respondent erred when it trespassed into matters of enforcement that are separate and apart from that of approval.

Irrelevant Matters

27. Mr Broadhurst argues that the First Respondent erred when it based its Decision solely on the damage associated with the removal of the concrete slab, as noted by the Department. Counsel for the Appellant contends that the Decision is inherently flawed on the basis that all subsequent after-the-fact applications, specifically where concrete slab is poured on the ironshore prior to an application for planning permission, would then be approved. The First Respondent, Mr Broadhurst suggests, acted unreasonably in its failure to consider other remedies that may have been available other than the removal of the concrete slab.

28. Counsel for the First Respondent refutes this suggestion and asserts that the possible environmental effect from the removal of the concrete slab is relevant to the process. Mr Gayle claims that Regulation 8 (11)(f) permits the First Respondent to consider any other

material consideration that is likely to affect the proposal. Ms Tibbetts adopts this position on behalf of the Second Respondent.

29. The suggestion by Mr Broadhurst that the Decision is likely to set a precedent is refuted, by Mr Gayle, on the basis that each application is to be determined on its own facts and circumstances. Mr Gayle argues that the Decision was based on the character of the development's area and the effect on the ability for the adjacent land owner to enjoy the amenity of their land, which he claims is not unreasonable.

30. Ms Tibbetts submits that the Decision is devoid of any reference that supports this contention advanced by Mr Broadhurst and that the Appellant has failed to establish that the First Respondent either acted unreasonably or considered irrelevant matters.

31. For reasons articulated at paragraph 24 and 25 above, we accept the argument advanced by counsel for the Appellant to the extent that the First Respondent erred in law. The effect of environmental impact of the removal of the concrete slab is a matter of enforcement that is beyond the scope of the After-The-Fact Application. Though the First Respondent is authorised under Regulation 8(11) to consider any other material consideration that will affect the proposal, it should have confined itself to the decision whether to approve or deny the After-the-Fact Application, rather than to speculate as to the means of enforcement in the event of the After-the-Fact Application being refused.

<u>Failure to give adequate reasons</u>

32. Mr Broadhurst submits that the First Respondent failed to address the relevant factors and to the extent that it did, there was a failure to give adequate reasons. Counsel for the Appellant relies specifically on the significance of the matters and argues that the failure to give reasons caused the First Respondent to err in law.

33. Mr Gayle states that sufficient reasons were provided, though the Appellant may not have liked the reasons given. Counsel for the First Respondent relies on Rule 4 of the Development and Planning (*Appeal*) Rules (1999 *Revision*) (the "Rules") in the contention that the Decision met the requirement of providing a written statement.

34. Ms Tibbetts also asserts that the reasons provided are more than adequate for the purposes of Rules and that there is no duty on the First Respondent to mention every material matter considered, provided such reasons are comprehensible and logical. Counsel for the First Respondent relies on the case of *Seven Mile Beach Resorts Ltd and another v Planning Appeals Tribunal and another* [1997] CILR Notes-12.

35. We note the well-established principle enunciated in the case of Grand View Strata Corporation v. The Planning Appeals Tribunal (Grand Court 8 April 2016), where the Grand Court overturned a decision on the basis that the CPA failed to provide adequate reasons in relation to an application for a ten-storey building. The Honourable Justice Panton in relation to the issue of setback stated the following:

> "*The Department of Planning also referred to the drawings as depicting a rather aesthetically bland building. Given those observations from the Department of Planning, although the CPA is entitled to differ from the objectors and all others, one would expect that the CPA would not only give its reasons for applying the minimum setbacks to a project of this size, but also for approving a building that is apparently generally regarded as ugly and out of character with those around it. In particular, the CPA ought to have stated how it dealt with the question of setbacks in respect of the 8th, 9th and 10th storeys, if it dealt with it at all. 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."

36. The instant case is vastly different from the issues that arose in Grand View. The latter involved an application for a ten-storey building that was heavily resisted by numerous objectors. Conversely, this matter relates to a single objection to an After-the-Fact Application for a concrete slab. Further, the First Respondent made explicit reference to the established character of the relevant area unlike the proposed ten-storey building in Grand View.

37. We agree with counsel for the Respondents that the instant case is easily distinguishable and that sufficient reasons were given proportionate to the nature of the After-the-Fact Application and the notable objections. We also note that Honourable Justice Seymour Panton determined that the CPA is not obliged to give reasons for all its decisions. Notwithstanding this, the Decision expressly states that the approval was granted on the basis of the established character of the area and the ability for adjacent landowners to enjoy their lands, in addition to the environmental impact that would arise from the removal of the concrete slab. It is difficult to see how the Appellant could be unclear as to the reasons that formed the basis for the Decision.

Conclusion

38. The appeal is granted to the extent that the First Respondent erred when it deemed the non-removal of the slab as the basis of approval of the After-the-Fact Application. The former is a matter entirely for enforcement and should not influence the Decision in the way it has. Whilst we accept that Regulation 8 (11)(f) permits the First Respondent to consider any other material consideration that is likely to affect the proposal, we deem the

remit of the CPA restricted to the approval process only. It is for this reason that the matter is to be remitted to the CPA for rehearing.

Costs

39. No order as to costs.

Dated this 13 day of July 2021

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Chairman, Planning Appeals Tribunal