

**THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

**PUBLIC LAW DIVISION
2019/PUB/jrv/00018**

**IN THE MATTER OF An Application for Judicial Review pursuant to Order
53 Rule 5 of the Rules of the Supreme Court**

BETWEEN

(1) MR. BENJAMIN COUPLAND SIMMONS

(2) BR-ILAND ISLAND RESPONSIBLE DEVELOPMENT LTD.

Applicants

AND

TOWN PLANNING COMMITTEE

Respondent

AND

4M HARBOUR ISLAND LTD

Interested Party

Before: The Honourable Madam Justice G. Diane Stewart

Appearances: Mrs. Gail Lockhart Charles & Ms. Lisa Esfakis for the Applicants
Ms. Adelma Roach, Mr. David Higgins & Sabrina Deleveaux for the
Respondent
Mr. Robert Adams & Mr. Adrian Hunt for the Interested Party

Hearing Dates: 24th September 2019

Judgment Date: October 17, 2019

JUDGMENT

1. By Originating Notice of Motion for Judicial Review filed on August 20th, 2019, the Applicants Benjamin Coupland Simmons ("Simmons") and Br-Iland Responsible Development Ltd. ("BIRD") collectively "the Applicants" seek the following relief.

1. **An order quashing:**
 - a. **The decision of the Respondent pursuant to section 37 Planning and Subdivision Act 2010 ("the 2010 Act") to approve the demolition of a new 55 slip marina at Harbour Island ("the Marina"), forming part of a new development known as the Briland Residences and Marina ("the Development");**
 - b. **All permits and approvals granted pursuant to the Site Plan Approval in respect of the Development including Building Permits purportedly granted on 31 January and 6 September 2018**
2. **Alternatively, a declaration that development has been commenced as is being undertaken by the Interested Party ("IP) without the requisite approvals as required by section 36(2) of the 2010 Act and contrary to section 36(1);**
3. **A mandatory order requiring the Respondent to exercise its powers under section 48 to require the IP to cease development and restore the land to its condition before the unauthorized development took place and/or to bring the development into conformity with any permit lawfully granted.**
4. **Such further or other Orders as to this Honourable Court may seem just.**
5. **An Order for the costs of this application.**

2. The decision for judicial review is the site plan approval ("Site Plan Approval") granted by the Respondent Town Planning Committee (the TPC) at a meeting held on the 21st November, 2017 and contained in a letter issued to Mr. Alvan Rolle the architect of the Interested Party. The letter provided as follows:-

**"Your Reference
Our Reference: SPA/4/2017**

21st November, 2017

**Mr. Alvan K. Rolle
Alvan K. Rolle & Associates
P.O. Box N-7401
Nassau, Bahamas**

Dear Sir,

**RE: PROPOSED REDEVELOPMENT OF HARBOUR ISLAND MARINA & RESORT-
HARBOUR ISLAND, ELEUTHERA**

I wish to inform you that the Town Planning Committee considered your application relative to the above captioned proposal at the meeting held on the 21st November 2017. The Committee resolved to grant Site Plan Approval for the redevelopment of the Harbour Island Marina & Resort subject to the following conditions:

- (i) Retention of mature trees along the northern boundary of the property.
- (ii) Building setback of fifteen (15) feet along the eastern boundary and ten (10) feet along the southern boundary;
- (iii) The developer must implement sound attenuation measures in the buildings at the back of the house compound;
- (iv) A separate building application is required for the proposed marina;
- (v) The developer must adhere to the requirements of the Conservation and Protection of the Physical Landscape of the Bahamas Act;
- (vi) The E.I.A. and E.M.P. must satisfy the requirements of the B.E.S.T. Commission;
- (vii) Clear cutting is restricted to the footprint of approved buildings plus areas required for parking, driveways, fire and emergency access lanes, walkways and water features in landscaping schemes where applicable, clearing of the underbrush only of the remaining area is recommended (i.e. clear cutting is not to exceed 70% of the property);
- (viii) The developer must satisfy the requirements of the Civil Design Section of the Ministry of Public Works with regard to onsite driveways and drainage.

Certified copies of the approved plan are enclosed for your reference.

Sincerely,

**Charles B. Zonicle (Mr.)
Acting Director of Physical Planning
CBZ/trrt"**

BACKGROUND

3. "On the 11th August, 2017, a formal application was made by 4M Harbour Island Ltd ("4M") to the Department of Physical Planning ("the DPP") for Site Plan Approval of a marina expansion/improvement, inclusive of the construction of cottages, a small marina village, boutique hotel, multiple guest rooms and support buildings "(the Development)". This application was given the number SPA/4/2017.

4. Government Notices were published in the major newspapers including a publication in the Nassau Guardian on 20th October, 2017 by the Ministry of Public Work, Department of Physical Planning (DPP), notifying the general public that a consultation meeting would be held on Thursday, 16th November, 2017 at 6:30 p.m. at the Harbour Island All Age School, Harbour Island, Eleuthera, with regard to Site Plan Application SPA/4/2017 submitted by 4M. The said Government Notice also informed the public that the design plans would be available at the DPP in New Providence and at the Office of the Family Island Administrator where the public was allowed to review the documents.

5. By letter dated 13th November, 2017, the Acting Director of Physical Planning, Mr. Charles Zonicle (hereinafter referred to as "the Acting Director") wrote to MR. Alvan K. Rolle, the representative of 4M, informing that the site plan fee of \$2,500.00 for application number SPA/4/2017 is to be paid to the Accounts Section of the Ministry of Public Works at the earliest convenience which said fee was paid on 14th November, 2017.

6. The consultative meeting was held on 16th November, 2017 at the Harbour Island All Age School and the Minutes of the Meeting, recorded by the Bahamas Investment Authority (hereinafter referred to as "BIA"), indicated that more than 100 persons were in attendance. Attendees included Eleutherans and second home owners; staff from BIA; the Director of Lands and Surveys; the staff of Bahamas Environment, Science and Technology Commission (hereinafter referred to as ("the BEST Commission"); staff of the Ministry of Transport and Local Government including Controller of Ports, Port Department; the Administrator for North Eleuthera District; six members of the Council including the Chief Councillor; the Acting Director; the Buildings Control Officer; the Member of Parliament for North Eleuthera and representatives from 4M.

7. The Minutes of the BEST Commission recorded that a cross section of persons from government ministries and agencies made presentations as well as a resource person from 4M. The Minutes of the BEST Commission further recorded that ***"the Acting Director stated that the Developer submitted the plan for approval and a part of the reviewing process is to have a public meeting to gather views of the community"***.

8. Following the meeting of 16th November, 2017, the District Council convened a Special Called Meeting on the 20th November, 2017. A motion was moved and seconded to agree that the 4M Project in Harbour Island be approved, and for 4M to adopt Harbour Island Community Center; all Councillors in attendance unanimously agreed. After the Council's decision at the Called Meeting on 20th November, 2017, the Council communicated its decision to the Acting Director. On 21st November, 2017, the TPC considered the application SPA/4/2017 and resolved to grant Site Plan Approval. By letter dated 21st November, 2017, the Acting Director wrote Mr. Alvan Rolle informing him of the decision of the TPC to grant Site Plan Approval of the application.

9. Leave was granted to the Applicants to apply for judicial review on the 6th August,

2019 on the primary allegation that there was non-compliance with the **Planning and Subdivision Act (the PSA)** particularly in failing to hold a public meeting to hear and decide the application, and alternately if the PSA did not apply, there was no jurisdiction in the TPC to allow them to make the decision that they did.

ISSUES

10. All of the parties have accepted that the Site Plan Approval is invalid and unlawful and ought to be set aside but they differ as to the reason why the Approval is invalid and unlawful. Their differences arise from varying opinions as to which statute governs the Development and consequentially the decision to grant Site Plan Approval.

11. The Applicants primary ground is that the PSA governs the Development in Harbour Island and that there was a failure to comply with Section 37 of the PSA by the TPC, hence, any decision made by the TPC in breach of Section 37 is unlawful and invalid and ought to be quashed. In order to find that the PSA applies to the Development the Applicants submit that the court must adopt a purposive construction of the statute.

12. They also posit the alternate ground that if the PSA was not extended to Harbour Island the Town Planning Committee (TPC) had no jurisdiction to grant the approval that it did hence its invalidity.

13. The TPC maintains that the Approval is unlawful because the decision was made by the wrong body. The TPC submits that as the PSA was not extended to Harbour Island, it had no authority to approve the Development, but one must look at existing legislation and determine whether there is existing law which can resolve the issue.

14. They maintain that the **Local Government Act** provides that the District Council of Harbour Island can exercise the powers of the Town Planning Committee under the TPA. However, since that act has been repealed one must substitute the PSA in its stead. Any decisions which the TPC is empowered to make under the PSA must be made by the District Council.

15. The Interested Party 4M maintains that the PSA was not extended to Harbour Island by the **Planning Subdivision (Extension to Family Islands) Order 2012** and that it is clear that parliament did not intend that the PSA was to extend to Harbour Island and that the provisions of the TPA were to continue to govern developments in Harbour Island.

16. 4M submits that there was no lacuna in the law, and therefore no need to apply a purposive or alternate approach to interpreting the statute.

17. The issue for this court to determine is the cause of the invalidity of the Site Plan Approval. The court accepts that the decision by the TPC granting Site Plan Approval for the development of the marina is invalid and unlawful and also any decision which

directly flows from that Approval.

LAW

18. It is important to set out the relevant sections of the various statutes which govern inter alia town planning and development projects in the Bahamas.

19. The PSA replaced the TPA in 2010, as an act to combine, consolidate and revise the Law relating to Town Planning and the Law relating to the Development of Subdivisions and to provide for matters connected thereto.

20. Section 2 of the PSA states:-

“(1) This Act shall apply to the Island of New Providence and shall extend to —

- (a) any Family Island or Family Island Local Government District; and**
- (b) the Port Area of Grand Bahama (under the jurisdiction of The Grand Bahama Port Authority Limited as defined in the Hawksbill Creek Grand Bahama (Deep Water Harbour and Industrial Area) Act (Ch. 261), the Freeport Bye-laws Act (Ch. 29) and the Freeport (Building Code and Sanitary Code) Bye-laws),**

on such dates as the Minister may by Order appoint and different provisions of this Act may be so applied on different dates.

(4) The provisions of this Act apply to all development types and land ownership arrangements including gated communities with or without government assumed rights of way.”

(5) Where this Act has not been extended to any area defined in subsection (1)(a) and (b), section 76 shall not prejudice the application of the existing law to those islands or districts.

21. Section 3 of the PSA states:-

(1) The objects and purposes of this Act are to —

- (a) provide for a land use planning based development control system led by policy, land use designations and zoning;**
- (b) prevent indiscriminate division and development of land;**
- (c) ensure the efficient and orderly provision of infrastructure and services to the built environment;**
- (d) promote sustainable development in a healthy natural environment;**
- (e) maintain and improve the quality of the physical and natural environment;**

- (f) protect and conserve the natural and cultural heritage of The Bahamas;
- (g) provide for planning processes that are fair by making them open, accessible, timely and efficient;
- (h) recognize the decision making authority and accountability of the Government in land use planning;

and

- (i) plan for the development and maintenance of safe and viable communities, within the policies, and by the means, provided under this Act.

(2) This Act shall receive such purposive and liberal construction and interpretation as best ensures the attainment of its objects and purposes.”

22. Section 2 of the Planning and Subdivision (Extension to Family Islands) Order 2012 (“Extension Order”) provides:-

“With effect from the 1st day of December, 2011, the Planning and Subdivision Act, 2010 (with the exception of sections 15 to 21), shall extend to the Islands specified in the *Schedule*.”

The Schedule lists the islands as follows:-

- Abaco (including cays)
- Grand Bahama and Cays (excluding the Port Area of Grand Bahama)
- Sweetings Cay
- Biminis
- The Berry Islands
- Eleuthera
- Andros (including cays)
- Exuma (including cays)
- Cat Island
- San Salvador
- Long Island
- Rum Cay
- The Ragged Island Chain
- Crooked Island and Long Cay
- Acklins
- Mayaguana
- Inagua

23. Section 36 (1) and (2) (c) of the PSA states:-

(1) Notwithstanding the provisions of any other Act to the contrary, no

person shall commence or carry out any development of land, except in accordance with the approvals required under this Act.

(2) Specifically, no person shall proceed to develop without having first applied for and obtained, if applicable —

(e) Site Plan Approval by the Committee;

24. Section 37 of the PSA states:-

“(1) The committee shall hold public hearings to hear and decide on applications for development made pursuant to section 36.

(6) Without prejudice to the provisions of this Act as to the duration, revocation or modification of planning approval, any approval given under this Act shall, except in so far as the approval otherwise provides, endure with the land and is not transferable.”

25. Rule 4 (1), (4) of the Town Planning Committee Rules 2011 which were promulgated by the Minister in exercise of powers granted in the PSA states:-

“(1) In accordance with section 37(1) of the Act, the Committee shall hold public hearings to hear and decide on applications for development of land at least once in every month at such times and places within The Bahamas as the Chairman may designate and shall conduct its proceedings in such matter as it may consider most convenient for the efficient and effectual dispatch of its duties.”

26. Section 7 (1) & (2) of the TPA States:-

“(1) It shall not be lawful to erect or commence to erect or cause or procure to be erected or commenced any building or to make any material change in the use of any building or land without having first obtained the sanction of the Committee as to the proposed extent, style or architecture, size of the building and the position on the site and as to the use to which the said building or land is to be put having regard to the area in which such building or land is situated.

(2) The Committee may upon application being made for that purpose and after consideration of such information, particulars and plans as may be prescribed, in the first instance grant its sanction in outline as to all or any of the matters provided in subsection (1) of this section, but subject to such conditions as it may think fit to impose.”

27. Section 10 of the TPA states:-

“(10) In considering whether or not to issue its sanction under section 7 or 9 of this Act, the Committee shall hear the application in as judicial a manner as possible having regard to all the circumstances of the particular application. “

28. Section 14(1) of the TPA states:-

“(1) This Act shall apply to the Island of New Providence but the Governor-General may from time to time by Order direct that all or any of the provisions of this Act shall extend with such exceptions, adaptations and modifications as may be specified in the Order to any Out Island district or part of an Out Island district to be defined in such Order.

(2) It shall be lawful for the Governor-General in any such Order to constitute and appoint a Local Committee of not less than five members one of whom, notwithstanding paragraph (a) of the proviso to subsection (l) of section 3 of this Act, may be the Commissioner, who shall hold office at the Governor-General’s pleasure and subject to this shall hold office for such period as shall be specified in such Order and one of whom shall be appointed Chairman thereof. A Local Committee so appointed may in any such Order be invested with all or any of the powers and responsibilities of the Committee under this Act within the Out Island district or part of a district for which it is appointed and in any such case the exercise of those powers and the discharge of those responsibilities by the Local Committee shall operate as if the same had been exercised or discharged by the Committee appointed under section 3 of this Act.

29. Section 2(1) of the Town Planning (Extension to Out Islands) Order states:-

“(1) All the provisions of the Town Planning Act, as amended, with the exception of section 7 thereof, shall apply to the Out Island districts and parts of districts which are specified in the Schedule to this Order.

The Schedule includes:-

ELEUTHERA DISTRICT

“The Eleuthera District Shall include:

(a) The island of Eleuthera;

(b) All islands and cays situated and being within nine miles southwards, eastwards, and westwards of Governor’s Harbour Airstrip.

(c) All islands and cays situated and being within nine miles eastward, northward, and westward of Governor’s Harbour Airstrip including Spanish Wells, Harbour Island and Current Island.”

30. Section 14(1) of the Local Government Act states:-

“14. (1) Notwithstanding the provisions of any other law but subject to subsections (2) and (3), each Council of a district (other than a

district specified in the Third Schedule) —

(a) shall appoint boards which shall have and exercise, in relation to that district —

(iii) the functions assigned to the Town Planning Committee under the provisions of the Town Planning Act:

31. Section 14(2) states:-

“(2) The Councils of the districts specified in the Third Schedule (other than the district of the City of Freeport) shall perform in relation to the respective districts —

(a) the functions conferred upon boards by subsection (1)(a)(i) to (vi) of this section;

32. The Third Schedule lists the Local Government Districts as follows:-

**“Acklins
Berry Islands
Bimini
Black Point
City of Freeport
Crooked Island and
Long Cay
Grand Cay
Harbour Island
Hope Town
Inagua
Mangrove Cay
Mayaguana
Moores Island
North Eleuthera
Ragged Island
Rum Cay
San Salvador
Spanish Wells**

33. The 1st Applicant is a resident and operator of a small boutique family run hotel on Harbour Island.

34. The 2nd Applicant is a company incorporated in May 2019 for the purpose of participating in these proceedings by residents of Harbour Island. The members of the 2nd Applicant are residents of Harbour Island.

35. The TPC is the Committee established under the PSA with responsibility to inter alia hear and decide on applications for development of land.

36. 4M is the developer of the Development which was to be a planned two phase redevelopment of the Harbour Island Marina ("the Marina") in an upscale seasonal community. (The Project")

37. This judicial review application is concerned only with the development of the marina as I understand that no work has commenced on the development of the land portion of the Project.

38. In granting the leave I was satisfied of the locus of both Applicants to make the application.

39. It is accepted that there was no public hearing to determine the application for site plan approval as mandated by Section 37. Accordingly if the PSA Act applied to Harbour Island, the site plan approval would be quashed for failure to hold a public hearing.

40. It is also accepted that the PSA does not list Harbour Island as an island to which this Act was extended.

41. If the PSA does not apply then the Town Planning Committee had no jurisdiction to make any decision pursuant to the powers granted under the PSA and the approval would be quashed as ultra vires their jurisdiction. The appropriate authority governing the development projects for Harbour Island would be the Local District Council who did not in fact grant any approval.

42. This Court must decide which statute governed the project of 4M Harbour Island in order to determine why the approval must be quashed.

WHICH STATUTE GOVERNS THE PROJECT

43. Counsel for the Applicants relies on Section 3 of the PSA in order to support her submission that despite the obvious omission of Harbour Island from the Extension Order, the Court should construe the statute as intending to include all of the islands of the Bahamas inclusive of Harbour Island in the schedule so as to give effect to the stated purposes. In other words, the Court must adopt a purposive construction of the statute.

44. **Bennion on Statutory Interpretation at p.944** states:-

"A purposive construction of an enactment is one which gives effect to the legislative purpose by-

(a) following the literal meaning of the enactment where that meaning is in accordance with legislative purpose;

or

(b) applying a strained, meaning where the literal meaning is not in accordance with the legislative purpose."

45. In this judicial review application, a purposive construction would be to apply a strained meaning to the Extension Order as the literal meaning i.e. the omission of Harbour Island as an island to which the statute applied would not be in accordance with the legislative purpose.

46. There is a tendency to equate a purposive construction with a liberal construction. The need for purposive construction has been recognized for years as Bennion states:-
“The difficulties over statutory interpretation belong to the language and there is unlikely to be anything very novel or recent about their solution.”

47. In Jones v Wrotham Park Settled Estates 1980 AC 74 at p.105 Lord Diplock stated:-

...I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction, even where this involves reading into the Act words which are not expressly included in it. *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 provides an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law. Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed.”

48. In Inco Europe v First Choice Distribution 2000 WLR 586 and 592; Lord Nicholls modified this three pronged approach:

“It has long been established that role of the court is in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function, the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross’s admirable opusculum, *Statutory Interpretation*, 3rd ed. (1995), pp. 93-105. He comments, at p.103:

“In omitting or inserting words, the judge is not really engaged in a hypothetical reconstruction of intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory

provision read in its appropriate context and within the limits of the judicial role.”

This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretive. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters:

- (1) The intended purpose of the statute or provision in question;*
- (2) That by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question;*
and
- (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed.*

The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation”

Lord Nichols also confirmed that there is no need for an ambiguity to exist as a prerequisite to applying this purposive approach.

49. In order to determine whether the PSA applies to Harbour Island this court must determine if it should apply a purposive construction to the statute. In order to do so I must be satisfied that the three conditions as established by Lord Diplock and Lord Nicholls have been met with regard to the Extension Order of 2012.

50. By virtue of Section 3 of the PSA it is apparent that the consolidation of the legislation is the mischief which the purpose of the Act and the Extension Order was intended to remedy, however, it cannot be said with any certainty that the draftsman omitted or missed Harbour Island in error from the Extension Order particularly when;

(1) Section 1(2) of the PSA states:-

“This Act shall come into force on such date as the Minister may appoint by notice published in the Gazette and different dates may be appointed by different notices for the coming into force of particular sections or any part of this Act.”

(2) Further, section 2(1)(a) states:-

“(1) This Act shall apply to the Island of New Providence and shall extend to —

(a) any Family Island or Family Island Local Government District;

on such dates as the Minister may by Order appoint and different provisions of this Act may be so applied on different dates.”

(3) Section 2 (5) states:-

“Where this Act has not been extended to any area defined in subsection (1)(a) and (b), section 76 shall not prejudice the application of the existing law to those islands or districts.”

All of these provisions plainly speak to the acknowledgement that the Act is to apply to various islands at different times and until such time that the order is extended to an island, the existing law would apply to the island not included in any Extension Order. The language is clear.

51. Further, I am not satisfied that the words to be supplied in the Schedule in fulfillment of the third condition are “Harbour Island” as opposed to adding other islands not specifically listed. E.g. Spanish Wells and Current Island. Even when referring to the Interpretation and General Clause Act, Chapter 2 of the Statute Laws of the Commonwealth of the Bahamas which provides that New Providence shall mean Nassau and Paradise Island, there is no similar meaning for other islands where there are cays which are geographically proximate.

52. In The Tenesheles Trust and others v BDO MANN JUDD and others [2009]2 BHS J No. 17 Justice Adderley referred to Magar and St. Mellons Rural District Council v Newport 1952 AC at p. 191 where Lord Simonds criticized the dissenting opinion of Denning LJ from the English Court of Appeal on the role of the court in interpreting statutes and held;

“The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court is to travel outside them on a voyage of discovery are strictly limited.”

Lord Morton further supported Lord Simonds where he stated:-

“In so far as the intention of Parliament or of Ministers is revealed in Acts of Parliament or Orders, either by the language used or by necessary implication, the courts should, of course carry these intentions out; but it is not the function of any judge to fill in what he conceived to be the gaps in an Act of Parliament. If he does so, he is usurping the function of the legislature.”

53. In Tenesheles Adderley J, ruled that the court could not infer or fill in the new IBC Act 2000 a power of the Registrar to restore a company struck off for non-payment of fees where the old Act contained such a power but was repealed.

54. Section 2 of the PSA provides for the identified lacuna (the omission of Harbour Island in the 2012 Order). Section 2(5) provides that if the Act does not extend to a Family Island, then section 76 shall not prejudice the application of the existing law. The existing law at the time of the enactment of the PSA governs the approval.

55. Accordingly, I am not prepared to apply a purposive construction to the Extension Order to include Harbour Island as the three prerequisites have not been met. The PSA cannot apply to Harbour Island by this approach.

WHAT IS THE EXISTING LAW?

56. Section 2(5) of the PSA is the authority that in the absence of the PSA being extended to a family island, the TPA will apply as it was the existing law prior to the enactment of the PSA.

57. In Bowe v Government of the United States (1988) LRC 157 at 203, the Court of Appeal interpreted the phrase "existing law" as referred to in Section 4 of the 1973 Independence Order to mean the 1935 Order which was in existence at the time of the passing of the 1973 Order of Independence.

58. In Worme and another v Commissioner of Police of Grenada [2004] 2WIR 1044 the Privy Council held that the term existing law should not be construed to mean substituted enactments as it relates to substituted provisions in the Criminal Code which only came into effect by virtue of the Continuous Revision of the Laws Act in 1994 and ought to be given restrictive interpretation unless the legislature expressly extended the meaning to subsequent legislation.

Lord Roger stated:-

"The present provisions had therefore formed parts of the law of Grenada only since 1994 and were not part of the law immediately before independence. It would not be legitimate to construe the term "existing law" generously so as to cover such substituted provisions since where that was intended, other Caribbean constitutions made special provisions to include such re-enactments. ... A court could be expected to apply a restrictive interpretation to the phrase "existing law". The legislatures have forestalled that by expressly extending the definition with the saving clause to cover re-enactments etc."

59. The PSA does not include any definition to extend the definition of existing law to any re-enactments or substitutes. One therefore must look at what was the law in force prior to the PSA which governed the same matters as the PSA.

60. The repeal provision of the PSA is instructive. It states:-

"Subject to Section 2, the Town Planning Act... are hereby repealed." The repeal is subject to Section 2(5) which saves the TPA if the PSA is not extended.

61. Further, the short title of the PSA states:-

"An Act to combine, consolidate and revise the law relating to Town Planning and Law relating to the development of subdivisions and to provide for matters connected thereto."

Both these provisions clearly show that the law being replaced is the Town Planning Act which was the existing law. It is the Town Planning Act which must therefore be

complied with for development projects for Harbour Island and not the Local Government Act.

62. Section 2(5) does not provide for or include in the definition of existing law any substitutes and therefore a restrictive approach must be utilized. The Local Government Act cannot be substituted as the existing law governing the Project.

CAN THE COURT SUBSTITUTE REFERENCES TO READ AS REFERRING TO THE PSA SINCE THE TPA WAS REPEALED BY THE PSA?

63. Section 14(2) of the Interpretation and General Clauses Act supports the proposition that references to a repealed Act in other statutes constitute references to the new enactment which amends or replaces. Section 14(2) provides:-

“Where any Act repeals and re-enacts, with or without modification, any provision of a former Act, references in any other Act to the provision so repealed shall be construed as references to the provision so reenacted. “

64. Had the Local Government Act applied as the existing law then references to the TPA would be replaced by references to the PSA. However, as the TPA is the existing law, the court must look to the provisions of that statute to determine the procedure for processing of applications like the Project.

65. Under the TPA, the District Council for Harbour Island is empowered to make decisions, including granting approvals for town planning matters for Harbour Island utilizing the powers, rights, and obligations under that statute. As no decision was made by the District Council and this was accepted as so both by the TPC and 4M, the Site Plan Approval to develop inter alia the marina, granted by the TPC to 4M was unlawful and without jurisdiction. Their approval and any decision which flowed directly therefrom must be quashed and I so order. The TPC had no jurisdiction to make the decision as the PSA Act does not apply to Harbour Island for the reasons set forth above.

66. I further order that the Marina Development be stayed pending an application being made to the appropriate authority and a decision made in compliance with the law. All further relief is denied.

COSTS

67. Cost normally follow the event. Judicial Review applications seek to determine the validity or invalidity of public decisions.

68. Both the TPC and 4M conceded at the leave stage that the decision granting the Site Plan Approval was invalid and unlawful as the TPC lacked the jurisdiction to grant it.

69. The sole dispute at the hearing was the cause of the invalidity, namely which statute governed the application and decision making of the Project and whether there was compliance with that statute.

70. The Applicants primary argument was that the PSA governed the application and decision making by the Court adopting a purposive construction of the statute. This argument failed.

71. The court held that the PSA did not apply and accepted the submissions of 4M and the partial submissions of the TPC. The alternate argument of the Applicants arose as a result of the amendment granted during the application for leave and was a consequence of the submissions made by 4M.

72. Both the Applicants and 4M seek costs on an indemnity basis for different reasons. The TPC seeks costs against the Applicants on a standard basis.

73. The Applicants seek costs on an indemnity basis against 4M for the:-

- (i) the interim injunction;
- (ii) the abandoned application to set aside the interim injunction and for fortification
and
- (iii) the abandoned security for costs application.

Further the Applicants seek costs on a standard basis against the TPC and 4M occasioned by the application for judicial review.

74. 4M seek costs against the Applicants on an indemnity basis arising out of their pursuing the judicial review application despite the early concession of the both the TPC and 4M.

75. The court has power in contentious proceedings to order the unsuccessful party to pay the successful party's costs on bases other than party and party or common fund bases which can include on an indemnity basis. **BMI Records Ltd v Ian Cameron Wallace Ltd [1980] 1Ch 59**

76. Order 59 Rule 3(2) states:-

“If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.”

77. The issues to be determined are:-

- (i) Whether to allow full costs to any party; and
- (ii) Whether to allow costs on a standard or an indemnity basis?

78. The Site Plan Approval has been quashed because of the lack of jurisdiction in the TPC granting the same as the PSA which empowers the TPC to grant site plan approvals does not apply to Harbour Island.

79. This was conceded during the leave application by both 4M and the TPC.

80. The other applications referred to by the Applicant as “abandoned”, have not been withdrawn or abandoned and therefore their “abandonment” cannot constitute a basis for awarding costs on indemnity basis. Parties are at liberty to deal with applications as they see fit subject to the power of the court to control proceedings and upon the applications being heard the appropriate order for costs will be made.

81. The Applicants were successful in moving the court to review the Site Plan Approval. At the hearing of the application for leave, the TPC and 4M both recognized the invalidity of the approval and properly conceded the same on the basis that the PSA did not apply to Harbour Island.

82. The Applicants insisted on a determination of the judicial review process to examine solely the cause of the invalidity as they maintained that the PSA applied to Harbour Island and that there was noncompliance with the Act. They were not successful in their contention.

83. There should be some recognition of the success of the Applicants in moving the court to review the decision, however in my opinion they are not entitled to full costs. They are entitled to costs on a standard basis against the TPC for the leave application, save for the application to amend the Notice of Motion for leave. The costs of the application for leave to amend is to be awarded to the TPC and 4M on a standard basis and to be borne by the Applicants. The Applicants are also awarded costs on a standard basis against 4M for the application for the ex parte injunction.

84. As the substantive judicial review application was simply to determine the reason for the quashing of the decision, the Applicants did not succeed, on their primary ground and their alternate ground had been conceded. The TPC’s reason for the quashing was only partially upheld by the court. Costs of the substantive hearing are awarded to 4M and 50 percent of the cost of TPC to be paid by the Applicants on a standard basis. All of the costs awarded are to be taxed if not agreed.



G. Diane Stewart
Justice