In The Supreme Court of Bermuda

COMMERCIAL COURT

APPELLATE JURISDICTION

2017: No. 271

THE BERMUDA ENVIRONMENTAL SUSTAINABILITY TASKFORCE

Appellant

-AND-

THE MINISTER OF HOME AFFAIRS

(in his capacity as Minister responsible for planning)

Respondent

CAROLINE BAY LIMITED

(formerly known as Morgan's Point Limited)

Interested Party

JUDGMENT

(in Court)

Appeal by objector against grant of planning permission by Minister-access road over protected agricultural land-whether Minister in adjudicating appeals has unfettered discretion to depart from Development Plan if planning application involves altering the status of protected land- whether condition attached to planning permission unenforceable for uncertainty or ultra vires-Development and Planning Act 1974

Date of hearing: December 11 &12, 2017
Date of Judgment: December 20, 2017[1]

[1] The present judgment was circulated to the parties without a hearing to formally hand down Judgment.

Mr. Alex Potts & Ms Caitlyn Conyers, Kennedys Chudleigh Ltd, for the Appellant ("BEST")
Mrs Lauren Sadler Best, Attorney General's Chambers, for the Respondent
Mr. Kim White, Cox Hallett Wilkinson Limited, for the Interested Party (the "Developer")

Introductory

1. The former US Naval Operating Base in Southampton is now known as Morgan's Point. The Morgan's Point Act 2011 provided for the Developer to acquire that land in exchange for a property known as Southlands which was considered to be too environmentally sensitive for a large scale hotel development. The Morgan's Point Resort Act 2014 granted in principle permission for possibly the largest private development in Bermuda's history. It is expected to have significant economic benefits in terms of reviving tourism and creating jobs. Having obtained final planning permission for Phase 1 of the development, the Developer applied for permission to construct an access road from Middle Road across the Glebe Lands and the Railway Trail to the Morgan's Point development site. The route would in part traverse an area of agricultural land which is under active cultivation (the "Land") with the consent of the land's owner. Although wise heads might well have intuited at an early stage that the end of the story was obvious, there were twists and turns along the way.

2. The first application for the access road was objected to by, *inter alia*, BEST, the Bermuda Farmer's Association and the Bermuda National Trust. The Development Applications Board ("DAB") refused the application and the then Minister (Mr Michael Fahy) refused the Developer's appeal on the grounds that there was insufficient justification provided in support. He gave guidance to the Developer as to what sort of information might achieve a different result. The Developer carried out various studies, offered to make alternative agricultural land available and made a second application for the access road. The application was objected to. The DAB again refused the application on the grounds that no sufficient present need for compromising the integrity of farm land had been made out. The Developer appealed. The Minister (Mr Sylvan Richards) appointed an independent Planning Inspector who advised the Minister that there were good grounds for allowing the appeal and granting the permission the Developer sought.

3. BEST alone of the various objectors took on the daunting challenge of appealing the Minister's decision. BEST's principals were, no doubt, inspired by the spirit reflected in Theodore Roosevelt's words[2]:

> "*Far better is it to dare mighty things, to win glorious triumphs, even though checkered by failure... than to rank with those poor spirits who neither enjoy*

[2] President Theodore Roosevelt's son, President Franklin D. Roosevelt, in 1940 entered into the Lend Lease agreement with Britain which resulted in the construction of the US Naval Offshore Base and the creation of the land which is now Morgan's Point.

nor suffer much, because they live in a gray twilight that knows not victory nor defeat."

4. Because of the generous ambit of discretion which the Development and Planning Act 1974 (the "Act") confers on the Minister, which entitles him (but not the DAB) to grant planning permission in circumstances which depart from the requirements of his own Development Plan, and the limited appellate jurisdiction conferred on this Court, BEST's appeal must be dismissed. On the one hand, the present appeal serves to demonstrate not just certain institutional weaknesses (from a sustainable development standpoint) with the way large scale developments receive legislative approval. It also demonstrates the extent to which BEST and other local environmental bodies have effectively shaped the way major developments progress through the planning process so that applications are subjected to rigorous scrutiny.

The Minister's Decision

The Minister Fahy Decision

5. Mr Potts heaped praise on Minister Fahy's decision to refuse the Developer's first application on January 22, 2016 although he doubted whether the Minister strictly had the power to add the 'Advice Note', effectively pointing the way to a successful second application. The decision itself crucially concluded that insufficient information was provided about the traffic impact or the impact on the currently productive arable land. In the latter regard, it is noteworthy that the Developer had already advanced without specificity the notion of making additional arable land available in return for the access road. The Minister followed the Planning Inspector's recommendation in rejecting the appeal. In requiring studies to be produced in relation to traffic and environmental impact, the Minister (and the DAB and Director before him) were applying the spirit of the requirements of the Morgan's Point Resort Act in relation to the development area (section 7(e) (iii)-(iv)) itself to the ancillary access application.

The DAB Decision

6. Following Minister Fahy refusal decision, the Developer (represented by Cooper Gardner) submitted Grounds in Support of a revised application to the DAB on August 30, 2016. It was supported by a Traffic Impact Study ("TIS"), a Road Location Analysis and a Stakeholder Consultation Plan. There were Letters of Support from three neighbouring businesses and the tenant farmer. A subdivision application dated September 2, 2016 was received by the Department of Planning on September 7, 2016. Objections followed from the Bermuda National Trust (September 15, 2016), BEST (September 16, 2016) and the Bermuda Farmer's Association (September 30, 2016). These objections may be summarised as follows:

- **Bermuda National Trust**: acknowledged that reconfiguring the land would produce a small net gain of arable land, but argued that the disruption to the soil and pollution would reduce productivity;

- **BEST**: stated that fragmentation of one of the largest plots of farmland was unacceptable, would result in potential conflicts between the farmer and the Developer, preferred another access road option and expressed concern that its objection to the first application had not been placed before the previous Minister;

- **Bermuda Farmer's Association**: stated that the proposal set a dangerous precedent and reflected a disregard for the importance of arable land as an asset and that the "*decision to still push for a road straight down the middle of the field baffles us*".

7. In a November 10, 2017 Memo, the Department of Environment and Natural Resources advised the Director of Planning that the Board of Agriculture did not support the application because (1) there would be a loss of protected agricultural reserve land, (2) farm operations would be disrupted, (3) drainage and runoff contamination would occur, and (4) artificial roadside lighting would adversely impact the growing patterns of crops. In a November 16, 2016, Memorandum, the same Department indicated that it did not support the application, noting that the TIS only emphasised the degree of harm the roadway would cause to the farm it would intersect. With considerable sagacity, the Memorandum identified issues which should be addressed in the event that "*MPD receive approval from the Planning Authority or via Ministerial Appeal*".

8. The Director notified the Developer by letter dated November 21, 2016 that the application could not be supported because the immediate need for the access road in support of Phase 1 was not apparent. The Department's duty under Chapter 20 of the Bermuda Plan was to give priority to protecting Agricultural Reserve areas, and no exceptional circumstances had been made out which justified departing from this principle. In a December 5, 2016 response, the Developer relied on the TIS for reiterating that the proposed route was the most suitable access. On the 'no imminent need' point, it was contended that it was best planning practice to deal with access roads at an early stage of a development, praying in aid the approach adopted to subdivision applications of ensuring "*adequate and safe means of access*". The Board Report from the Director recommended that the DAB refuse the application on the following key grounds:

> *"The parcel subject of the proposed access is actively farmed, easily accessible, has appropriate topography and connectivity to adjacent agricultural parcels. It is not considered to be good planning or best agricultural practice or in the spirit of sustainable development and the Bermuda Plan 2008 to approve a new road through a valuable, cultivated agricultural field to accommodate a future development that may or may not materialize 10-12 years from now. As indicated by the TIS, this new access road is only needed to accommodate Phase 2 of the Morgan's Point development. The proposal for this new access road should be reconsidered at the time of assessing a Phase 2 proposal and, as such, the application is recommended for refusal.*"

9. The Board accepted the Director's recommendation and refused the application on December 14, 2016.

The Developer's appeal

10. The Developer appealed against the DAB decision on January 17, 2017, by way of a Cooper Gardner letter which ran to 36 pages. Having regard to the subsequent determination of the appeal to the Minister, and the key issues identified in the course of the hearing of the present appeal, I found the following passage at page 20 of the appeal letter and to which Mr White referred, to be pivotal:

> "*The installation of the proposed road (during Phase 1) offers the area community traffic circulation related benefits by keeping significant traffic increases off an existing residential roadway and allows MPL to have a direct emergency access to their development. In planning key infrastructure, it is essential to consider the access and transportation needs of the MPL development within the context of the whole development as envisaged by the Act, and not in a piecemeal manner. The roadway is not being sought to simply service Phase 1, it is essential to service all levels of development approval granted under the Act. It would be shortsighted* [sic] *from a strategic planning perspective and show a lack of due diligence for MPL to do otherwise. Against the argument that the future phases may not happen, lies the counter argument that from an investment point of view, it would be foolhardy for a developer not to capitalize on the development potential afforded by the Act, and conversely it would be foolhardy to contemplate a road deemed to be unnecessary if the full development potential was not also definitively intended.*"

11. The Developer's appeal letter relied upon the fact that Morgan's Point was identified in Chapter 33 of the Bermuda Plan 2008 as a "*Special Study Area*" as justification for looking at the needs of that area in a flexible manner. Mr Potts in oral argument

before this Court dismissed this reasoning as "*utter nonsense…a red herring*". BEST did not engage with this argument in its March 2, 2017 response to the appeal, confining itself to the narrower environmental framing adopted by all those who had opposed the access road application. Meanwhile on February 17, 2017, the Director opposed the appeal concluding:

> "*The Department's stance on the proposal remains unchanged in that the proposal is premature until such time that further phases of the development which include the associated traffic to generate the real inherent need for a second access becomes more of a definitive reality.*"

12. However, in hindsight seemingly anticipating the triumph of economic over environmental policy dictates, the Director recommended that if the appeal was allowed, permission for the subdivision to create the access road should be subject to 10 conditions, several of which were carefully crafted to meet the exigencies of the present application.

The impugned Minister's decision

13. The January 17, 2017 appeal was directed to then Minister Cole Simons. Mr Sylvan Richards became the Minister responsible for the Environment on or about February 24, 2017. Just over two weeks later the Planning Inspector appointed to advise the Minister on the appeal submitted a 21 page Report recommending that the appeal should be allowed and planning permission for the access road granted subject to conditions. The Minister signed the Report accepting the recommendation only three days later on March 17, 2017. The Minister's formal written decision was not issued until two weeks later on March 31, 2017. Regretfully the Department of Planning, whose duty it was under the applicable rules omitted to notify BEST, a party to the appeal, of the Minister's decision until July 2017.

14. Superficially viewed, particularly from BEST's perspective, it is easy to understand how the decision-making process would be viewed as an inherently flawed and unfair one. However, in my judgment, this cynical view does not withstand careful scrutiny of the decision itself. The Minister essentially accepted the recommendations of the Planning Inspector, who is appointed to introduce a level of technical skill and professional independence into an appeal process which could otherwise easily reflect nothing more than the exercise of raw political power. Two passages in the Inspector's Report (at page 19), relied upon in argument by Mrs Sadler-Best and Mr White respectively, clearly summarise the heart of the Inspector's findings and accordingly the basis on which the appeal was determined:

> "*On the balance of the evidence, it would appear to me that the benefits to be gained to the Morgan's Point development by building the infrastructure at*

the beginning of the process in the planned way that is normal for major developments outweigh the impact on agriculture in the area….

Having weighed up the evidence presented in the context of this development and with the advantage of information which was not available when the application was considered previously, I am of the opinion that the Minister should allow these appeals subject to the following conditions:…

1. *The development hereby permitted shall begin before the expiration of 2(two) years from the date of this permission.*

2. *For the avoidance of doubt the consent hereby granted is for planning permission only. Prior to the commencement of building operations, a separate application for a building permit that is in compliance with the applicable Building Code must be made and approved.*

3. *A Construction Methodology Plan containing details of temporary construction access, location of protective fencing, neighbours' permission for grant of access, delineation of any required staging and storage areas, construction of related encroachments onto adjoining properties, potential negative impacts on the agricultural land and adjoining properties during construction and the proposed mitigation measures, shall be submitted to the Department of Planning for review and approval prior to the submission of a building permit application.*

4. *In accordance with Policy ARG.2 (2), Chapter 20 of the Bermuda Plan 2008 Planning Statement, a Conservation Management Plan shall be submitted for the rehabilitation work to be undertaken within the Agricultural Reserve in advance of the submission of a Building Permit Application to allow for review and approval. The Plan shall include a programme for implementation and shall be substantially completed prior to the issuance of a Certificate of Completion and Occupancy for the Building Permit associated with the approved roadway.*

5. *Prior to the issuance of a Certificate of Completion and Occupancy the applicant shall enter into an agreement with the Minister under the provisions of section 34 of the Bermuda Development and Planning Act 1974 to set aside 2.2 acres of land owned by the applicant for use for agricultural purposes.*

6. *In order to provide for the safe flow of traffic, access details shall conform to the requirements of Policy TPT.11, Chapter 11 of the Bermuda Plan 2008 Planning Statement and shall ensure that at the point of access onto the public rad, sight lines for a minimum distance of 90 feet can be*

achieved in either direction from a point 6 feet back from the edge of the carriageway. The said measures shall be implemented prior to the issuance of a Certificate of Completion and Occupancy.

7. *For the avoidance of doubt, in order to provide for the safe flow of traffic, the gradient of the hereby approved new access shall be in accordance with approved plans.*

8. *In order to avoid discharge of surface water onto the public road and agricultural land, provision shall be made from the control and disposal of storm water as shown on approved plans. Such measures shall be provided prior to the issuance of a Certificate of Completion and Occupancy.*

9. *In the interest of visual amenity, the entire site subject of this application shall be landscaped in accordance with the hereby approved plans prior to the issuance of a Certificate of Completion and Occupancy. Any trees or shrubs shown on approved plans which are removed, which die or which become seriously diseased or damaged shall be replaced by trees and/or shrubs of a similar pot size, growth size and species to those originally required to be planted.*

10. *Details of all borehole locations and specifications shall be to the design requirements of the Department of Environment and Natural Resource. Written approval from the Department of Environment and Natural Resources shall be provided with the submission of a Building Permit application.*

11. *For avoidance of doubt, if any lighting is planned for the roadway, a detailed lighting plan shall be submitted with a Building Permit. The said plan shall include location, luminaire type, wattage, pole height and illumination patterns. The lighting shall be designed to reduce the transmission of light, to minimize illumination upon agricultural land.*"

15. The Minister followed the Inspector's recommendations and permission subject to those conditions. He made clear the legal basis for his departure from the DAB's approach in the first substantive paragraph of his March 31, 2017 decision letter:

> "*The Board considered that the application did not meet the strict test of ARG.7 in that it would be possible to service Phase 1 of the development from George's Bay Road, it is within the Minister's discretion to view the applications in a way that considers other material considerations.*"

16. As Mrs Sadler-Best submitted, it is legally sufficient for the Minister to effectively adopt the Inspector's Report as the reasons for his decision: *Southdown Farm Limited and others-v- The Minister of the Environment* [2001] Bda LR 46 (Mitchell J).

17. Bearing in mind that appeals to this Court from the Minister are limited to questions of law, it is unsurprising that BEST's appeal depended on one central thesis: it was not legally open to the Minister to displace the environmental protection presumption which was embedded in both the Act and the Bermuda Plan in deference to economic and other policy concerns.

The grounds of appeal

18. The Notice of Originating Motion issued on July 27, 2017 was issued late because BEST was not given timely notice of the Minister's decision dated March 31, 2017. It seeks to set aside the Minister's decision and to restore the DAB's December 14, 2016 decision refusing the Developer's application. Alternatively, BEST sought to have the matter remitted for reconsideration by the Minister. The following grounds of appeal were advanced:

    (1) the Minister misdirected himself in law in failing to find that sections 6(4)(a), 28, 57(7) and/or the Fourth Schedule to the Act, and/or Chapter 20 of the Bermuda Plan 2008 gave rise to a statutory presumption in favour of preservation of the Land;

    (2) the Minister misdirected himself in law in finding that he was entitled to have regard to "other material considerations";

    (3) the Minister's decision was Wednesbury unreasonable;

    (4) the conditions attached to the planning permission granted by the Minister with reference to section 34 of the Act are legally unenforceable and void ab initio;

    (5) the Minister's decision was arrived at in a manner which was contrary to the rules of natural justice.

19. The final ground was not seriously pursued. The first two grounds are closely connected and can be dealt with as one.

Findings: was the Minister subject to the same statutory presumption in favour of preservation of the Land as the DAB clearly was?

20. It was essentially common ground that the DAB correctly interpreted its jurisdiction and that it was required in accordance with the Plan to give priority to the preservation of the Land. The Developer ultimately did not need to rely on any direct attack on the Board's interpretation of the Plan because the Minister's decision, as is apparent from the first substantive paragraph of his March 31, 2017 letter, was primarily grounded on his right to have regard to "*other material considerations*".

21. Mr Potts crucially relied on an analysis of the following statutory provisions of section 6:

> "*(4) A development plan may designate any part of Bermuda which has been selected by the Minister for treatment in accordance with a local plan prepared for that part of Bermuda—*
>
> *(a) as an environmental conservation area, being an area in which the preservation of the natural environment shall take precedence over other planning considerations;*
>
> (b) *as a special study area, being an area where the local circumstances are in the opinion of the Minister such as to require further study being made of the planning requirements for the area, with a view to all or any of the matters specified in the Third Schedule being provided for in a local plan.*"

22. This argument was advanced so beguilingly that Mr Potts' opponents and the Court were drawn into almost turning somersaults in an attempt to defuse the strongest limb of the Appellant's counsel's analysis while ignoring its weakest link. Controversy focused in oral argument on whether or not the Bermuda Plan has created environmental conservation areas under section 6(4)(a), or whether such areas could only be created by separate instruments. Mrs Sadler-Best initially suggested that several "*local plans*" existed but, after an adjournment, could only produce one for the City of Hamilton. Mr White relied, *inter alia*, on the special requirements of section 7 of the Act:

> "*7 (1) The Minister may prepare, in amplification of a development plan, a local plan for any part of Bermuda.*
>
> *(2) A local plan shall consist of a map and a written statement and shall—*
>
> *(a) formulate in such detail as the Minister thinks appropriate the Minister's proposals for the development and other use of land in that part of Bermuda or for any description of development or other use of such land;*

(b) contain such other matters as the Minister may think fit."

23. The Zoning Map for the Glebe Lands areas within which the Land is found designates it as a combination of "*Open Space Reserve*" and "*Agricultural Reserve*" Chapter 33 ("Special Study Areas") of the Bermuda Plan identifies "Morgan's Point" as a special study area pursuant to section 6(4)(b). Chapter 3 ("Zoning Maps") states that the Zoning Maps "*designate those important woodland and agricultural areas that should be conserved and protected*". Chapter 20 ("*Agricultural Reserve*") provides that:

> "*Priority shall therefore be given to protecting the integrity of Agricultural Reserve areas for their ecological, amenity and functional importance, and the presumption shall be that development is not permitted except in exceptional cases.*"

24. Mr Potts in his oral reply demonstrated conclusively that the local plan for the relevant area is contained in the Bermuda Plan itself by reference to the following provisions of Chapter 1 IDN.1:

> "*The Plan consists of:-*
>
> *(a) This document, the Bermuda Plan 2008 Planning Statement, which constitutes the written statement as called for by section 6 of the Act; and*
>
> (b) *The Bermuda Plan 2008 Zoning maps which designate the land into zones and special study areas and comprise 89 Zoning maps as called for by section 6 of the Act…*"

25. This intricate analysis, however, only serves to distract from closer scrutiny of the pivotal aspect of the section 6(4) point. Does section 6(4) impose a statutory duty to give priority to conservation areas at all? In my judgment the answer is plainly "no". All section 6(4) does is to empower the Minister to create conservation areas through statutory policy documents such as the Bermuda Plan 2008. The posited dichotomy between section 28, which did not bind the Minister but only the DAB, and section 6(4) which bound both, is a false one. Section 6(4) states in its introductory words "*A development plan may designate any part of Bermuda which has been selected by the Minister for treatment in accordance with a local plan*". Section 28(1) states in its introductory words: "*A development plan may designate by reference to this section areas of Bermuda (being areas considered to possess natural features of special environmental value) as areas (to be called "designated areas") to which one or more of the following heads of protection shall extend by virtue of this section*".

26. The legal protections relied upon may be viewed as a species of subsidiary legislation referred to in the Act as a development plan. In *Barber-v- The Minister of the Environment* [1997] UKPC 25, the development plan was characterised as having the status of a policy document by the Judicial Committee of the Privy Council. The

governing statutory provision which defines the Minister's appellate jurisdiction is the following subsection in section 57 of the Act:

> "*(7) In the exercise of his functions under this section the Minister shall have regard to the provisions of the development plan for the area where the land in question is situated, in so far as those provisions are material to the development of that land, and to any material consideration.*" [Emphasis added]

27. The authorities relied upon by Mrs Sadler-Best and Mr White clearly demonstrated that the Minister may depart from the Plan in reliance on "*any material consideration*". In contrast the Board is bound to follow the Plan (section 17). This Court is bound by the leading cases. Most prominent is *Barber-v- The Minister of the Environment* [1997] UKPC 25. Lord Slynn crucially opined as follows:

> "*19…In section 57(7) in the exercise of his functions on an appeal the Minister 'shall have regard to' the relevant provisions of the development plan and to any material consideration. The words the Minister 'shall have regard to' are to be contrasted with the words the Board 'shall not grant' in section 17. On the face of it there is a clear distinction. Under section 57 there is no absolute embargo on the grant of planning permission. The Minister must have regard to the development plan. He cannot ignore it altogether. But once he has had regard to it he may still grant or refuse planning permission. Under section 17 the Board cannot grant permission if the development would be at variance with the development plan…*
>
> *23…the Minister is required to have regard not merely to the development plan but also to 'any material consideration'. Other material planning considerations may point in a different direction to those in the plan. If so the Minister must decide between them so that he cannot be rigidly bound by the provisions of the development plan.*"

28. The Court of Appeal judgments in *Barber* [1995] Bda LR 9 point unerringly in the same direction. For instance, da Costa JA (at page 12 of his judgment) opined as follows:

> "*In my judgement Wade J. was correct when she observed in Somers Villa Ltd. v. The Minister of The Environment (Civil Jurisdiction 1992 no. 442)*[3] *at page 30:*
>
> > *'In carrying out her duties, it is lawful for the Minister to take into account the provision of the development plan for the area, so far as*

[3] [1993] Bda LR 52.

*material to the application and to any other consideration (section **57(7)** of the Act. Therefore, development plans are **one** and only one of the materials considerations that must be taken into account in considering planning applications' (emphasis in original).*"

29. In *Corporation of Hamilton-v- Minister of the Environment and Billings* [1998] Bda LR 17, the Court of Appeal for Bermuda confirmed that the merits of any material consideration relied upon by the Minister were, absent unreasonableness, entirely for him. Clough JA held (at page 14):

> "*The evaluation of the planning issue between the architects and the Corporation was for the Minister. In the absence of Wednesbury unreasonableness on the part of the Minister it is not for the Court to question that evaluation.*"

30. In summary, I find that the Minister was not constrained by those policy priorities in favour of conserving agricultural land which are derived from, *inter alia*, section 6(4) of the Act (supplemented by section 28 and the Fourth Schedule). Those priorities are found in the Plan and are merely required by section 6(4) to be set out in the Bermuda Plan. They are not primary legislation imperatives which are binding on the Minister under the statutory scheme.

Findings: Wednesbury unreasonableness

31. Properly analysed, BEST's secondary attack on the entirety of the Minister's decision was logically dependent upon the success of his initial grounds of appeal. In BEST's Skeleton Argument, this ground of appeal is opened in the following way:

> "*BEST's third ground of appeal is that the Minister's Decision, in granting planning permission to the Developer (and overturning the DAB Decisions), was Wednesbury unreasonable, being so unreasonable that no reasonable person acting reasonably could have made it, given the matters referred to above, including, but not limited to, the Minister's failure to have regard to relevant factors (such as the provisions of the 1974 Act and the Bermuda Plan and the statutory presumption in favour of preserving Agricultural Reserve), the Minister's regard to wholly irrelevant and/or immaterial factors (such as those related to special study areas), and the Minister's failure to properly have regard to the opposition to the applications (expressed not only by BEST and other non-Governmental organisations, but also by the governmental organisations charged with responsibility for the environment and planning).*"

32. These criticisms are not sustainable once the argument that the Minister is bound by the environmental protection presumptions found in section 6(4) has been rejected.

The relevant matters the Minister supposedly ignored and the irrelevant matters he supposedly took into account all presuppose that he was not entitled by section 57(7) to give priority to non-environmental planning considerations. These submissions invite the Court to do precisely what binding authorities enjoin this Court from doing: substituting its view of the merits of the competing material planning considerations. In short:

- the Minister clearly considered the basis on which the DAB made its decision;

- the Minister clearly had regard to conservationist considerations by seeking to ensure various safeguards for the Land through conditions, one of which was designed to achieve a net gain in agricultural land in the general area;

- the Minister gave priority to the Planning Inspector's view that good planning practice for large scale developments favoured early access approval rather than later 'as needed' approval, which was clearly a material consideration;

- the status of Morgan's Point as a major development area classified as a Special Study Area and the beneficiary of "in principle" approval through an Act of Parliament was an obviously material consideration;

- the TIS and other studies were not before the Minister in the first appeal, so no question of inconsistent decisions properly arose. The TIS, it should be noted, carried out an objective assessment of the access route alternatives and found the Developer's choice to be the best option. The next best option, George's Bay Road (BEST's first choice), was rejected in part because of the impact on area residents of an increased traffic flow, on its face an entirely rational planning consideration.

33. As Lord Hoffman opined in *Tesco Stores-v- Environment Secretary* [1995] 1 W.L.R 759 (at 780 F-H) on the limited role of a Court entertaining appeals limited to questions of law in the planning context as follows:

> "*The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.*

This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgement are within the exclusive province of the local planning authority or the Secretary of State."

34. This ground of appeal must also be refused.

Findings: the validity of the section 34 agreement condition

35. Condition 5 provides as follows:

"5. *Prior to the issuance of a Certificate of Completion and Occupancy the applicant shall enter into an agreement with the Minister under the provisions of section 34 of the Bermuda Development and Planning Act 1974 to set aside 2.2 acres of land owned by the applicant for use for agricultural purposes.*

36. It was submitted that the Minister's decision was invalid and void *ab initio* because:

- it was too uncertain and imprecise to be legally valid or enforceable;
- it was so clearly unreasonable that no reasonable planning authority could have imposed it and was therefore ultra vires.

37. Mr Potts relied, *inter alia*, upon Moore and Purdue, '*A Practical Approach to Planning Law*', Twelfth Edition (Oxford University Press: Oxford, 2012) at paragraph 15.25 et seq to explain the governing legal principles on the validity of conditions. The uncertainty test was formulated by the learned authors (at 15.25) as follows:

"*A condition may be void for uncertainty if it can be given no meaning at all, or no sensible or ascertainable meaning. A condition which is merely ambiguous will not fail for uncertainty, though the courts may be required to resolve the ambiguity. The courts of course, are frequently required to construe ambiguous language in other areas of the law, so have no difficulty in doing so in planning law.*"

38. On the face of the condition, and having had sight of the plans Mr White referred to with something of a flourish, I find the condition is not void for uncertainty. The land

to be set aside is identifiable, and the nature of the agreement is in outline terms clear. Section 34 of the Act provides as follows:

> "***Agreement regulating development or use of land***
>
> *34. (1) The Minister may enter into an agreement with any person interested in land for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be specified in the agreement; and any such agreement may contain such incidental and consequential provisions (including provisions of a financial character) as appear to the Minister to be necessary or expedient for the purposes of the agreement.*
>
> *(2) An agreement made under this section with any person interested in land may be enforced by the Minister against persons deriving title under that person in respect of the land as if the Minister were possessed of adjacent land and the agreement had been expressed to be made for the benefit of such land.*
>
> *(3) Nothing in this section or in any agreement made under this section shall—*
>
> *(a) restrict the exercise, in relation to land which is the subject of such an agreement, of any powers exercisable by the Board or the Minister or any other public authority under this Act so long as those powers are exercised in accordance with the provisions of this Act or any development plan; or*
>
> (b) *require the exercise of any such powers otherwise than as mentioned in paragraph (a).*"

39. Section 34 empowers the Minister to decide the detailed terms on which an agreement designed to regulate the development of land is entered into. He has the power to modify an agreement and substitute one agreement for another. The fact that the Minister's discretion is not fettered when he enters into a section 34 agreement means that he can supervise the enforcement of the condition he has seen fit to impose. The fact that section 34 and section 15 (under which planning permission is granted) are separate regimes[4] is in my judgment no legal impediment to the enforceability or validity of the condition. It is for the Minister- not this Court- to decide whether it is appropriate to dilute the protected status of the Land by permitting a division of the single parcel in return for a separate and potentially less sustainable portion of new agricultural land, a portion which may lose its protected section 34 status at some uncertain point. It is impossible to find, even viewing the facts through green-tinted spectacles, that no reasonable Minister would have imposed the impugned condition.

[4] *Minister of the Environment-v-The Bermuda National Trust* [2003] Bda L.R. 41.

40. Is the condition enforceable? On balance I find that the proposed agreement is enforceable. The Minister and /or the DAB will potentially be amenable to judicial review if the condition is not enforced. Its imposition very arguably gives rise to legitimate expectation (enforceable at the very least by the parties to the planning application) that the Planning authorities will diligently ensure that the condition is complied with to a meaningful or substantial extent.

41. I reject the submission that the Minister's decision should be set aside because an invalid condition was imposed.

Conclusion

42. The appeal is dismissed and, in light of the Protective Costs Order I made at the outset, I make no Order as to costs. The appeal has served the wider public interest in clarifying both strengths and weaknesses in the existing planning regime from a sustainable development standpoint.

43. Firstly, and positively, the present appeal serves to demonstrate how robustly Bermuda's planning system is in seeking to protect the environment. The Developer was forced to pursue two applications to obtain permission to build the access road through farmland. On the present occasion, the Director correctly sided with the Objectors in opposing the application because the Bermuda Plan 2008 required priority to be given to preserving agricultural land. This opposition was correctly upheld by the DAB, applying the presumption in favour of conservation and finding that the access road was not "necessary" at this time.

44. The Minister was entitled to depart from the Plan, but did so because the Developer took meaningful steps to justify the incursion on the farmland through carrying out, *inter alia*, a traffic study and making 2.2 acres of its land available for agricultural purposes. The Minister crucially accepted the advice of an independent Planning Inspector. This advice did not just take into account the realities of the fact that the Developer had received in principle permission to develop Morgan's Point through an Act of Parliament. The Inspector (no doubt partly in response to the Director's fall back submissions in opposition to the appeal), also recommended conditions which the Minister imposed. These were clearly designed to mitigate the adverse environmental impact that the access road would inevitably have on the protected Land.

45. BEST has previously had some success in establishing the importance of global environmental impact assessments (EIAs) being carried out for large-scale developments before planning permission is granted : *Bermuda Environmental Sustainability Taskforce-v-Minister of Home Affairs* [2015] Bda LR 74, I held:

> "*74. Bermuda has committed itself in various international agreements to use EIAs (fluidly defined) before approving major commercial projects with significant environmental implications. To the extent that the SDO is*

ambiguous as to whether it ought to be read as either excluding EIAs altogether or retaining the regulatory power to conduct an EIA, I would resolve such ambiguity in favour of construction which is most consistent with Bermuda's international treaty obligations."

46. In that case I noted (at paragraph 117): "*Clearly, the Minister adopted the SDO without first conducting a comprehensive or full EIA.*" The present appeal appeared to be a classic instance of "*déja vue*, all over again". Clearly, Parliament conferred approval in principle through the Morgan's Point Resort Act 2015 without first conducting a comprehensive EIA addressing not just the impact of the development on the development area itself, but also the impact of access on the adjoining areas. Section 7(2) reserved issues of access for subsequent decision as part of the final approval process.

47. In the course of argument, Mr Potts noted the irony of the Developer having applied for the access road as a discrete application, only to obtain approval from the Minister by reference to the needs of the main development. I agreed that it seemed inherently unfair for the Developer to have effectively 'teed up' a situation where its preferred access needs could not easily be denied; because the principle of the development and final approval for part of it was already a *fait accompli*. In my judgment, and contrary to the view I expressed during the hearing, the Developer cannot be faulted for proceeding in the way it did. It was permitted to proceed as it did, not simply by the planning process, which perhaps could merit review in this respect. Parliament had mandated that access be dealt with at the final approval phase as well.

48. At the end of the day, the pivotal finding of this Court (based on binding local authority) has been that the Development and Planning Act 1974 permits the Minister to override the environmental protection policies embodied in the Bermuda Plan 2008. The rationale for this legal conclusion is that they are the Minister's own policies. Should the Minister's wings be clipped and a positive legislative presumption in favour of conservation introduced into the Act? That is a matter for Parliament. The most the Court can say is that the Minister acted lawfully (and with some degree of environmental sensitivity) in granting the conditional permission that he did, following the advice of the Planning Inspector.

Dated this 20th day of December 2017 _____

IAN RC KAWALEY CJ