



Neutral Citation Number: [2025] CIGC (Civ) 6

Cause No: G 0131 of 2024

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

BETWEEN:

THE KING
(On the application of
THE NATIONAL CONSERVATION COUNCIL)

Applicant

-and-

- (1) THE CENTRAL PLANNING AUTHORITY**
- (2) THE DIRECTOR, DEPARTMENT OF PLANNING OF
THE CAYMAN ISLANDS GOVERNMENT**

Respondents

-and-

BON CREPE LTD

Interested Party

Appearances: **Mr Chris Buttler KC instructed by Ms Kate McClymont of Nelsons Legal
for the Applicant**

**Mr Tom Hickman KC instructed by Mr Vaughan Carter of Savannah Law
for the Respondents**

Before: **The Honourable Justice Jalil Asif KC**

Heard: **16-17 October 2024**

Judgment delivered: **5 February 2025**

Judicial review—unlawful grant of planning permission—whether judicial review to be dismissed as academic—whether decision to modify permission amounts to revocation—whether planning authority has power to revoke retrospective planning permission—whether planning permission should be quashed

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JUDGMENT

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A. Introduction

1. This is a claim for judicial review, brought by the National Conservation Council (“**the NCC**”) against the Central Planning Authority (“**the CPA**”) and the Director of the Department of Planning (“**the DoP**”). The NCC is the statutory body responsible under the National Conservation Act (2013 Revision) (“**the NC Act**”) for promoting biological diversity and the conservation and sustainable use of the natural resources of the Cayman Islands. The CPA is the body responsible for the determination of applications for planning permission under the Development and Planning Act (2021 Revision) (“**the D&P Act**”). The Director of the DoP is responsible for the operation of the DoP, including decisions whether or not to pursue enforcement action against those who carry out development works without the necessary planning permission.
2. This case involves an unfortunate clash between these government-funded bodies. This is the second such dispute between the CPA and the NCC within recent time: I refer to the earlier case of *Central Planning Authority v National Conservation Council* (CICA No.22 of 2022), in which the Court of Appeal gave guidance as to the allocation of responsibilities between the NCC and the CPA and the circumstances in which the CPA is required to consult with the NCC before making planning decisions.
3. The NCC states that its action in this case is motivated by a desire to protect for the benefit of present and future Caymanians the recovery from near extinction of the Cayman blue iguana, and its habitat, on which many millions of dollars have been spent, as well as protecting areas of mangroves, which are also under threat within the Islands.
4. The dispute arises out of decisions made by the CPA in February, March and April 2024 on an application by Bon Crepe Ltd, the Interested Party, for retrospective planning permission for a road built on land in East End, Grand Cayman, and the separate lack of enforcement action by the DoP in relation to the construction of the road. The NCC believes that the presence of the road has had and will have a detrimental effect on the environment and on the habitat of blue iguanas.
5. In brief, on 13 February 2024, the CPA considered Bon Crepe Ltd’s application for planning permission. The application was for retrospective permission for the road and for prospective permission for an extension to the road and for installation of gates. The CPA resolved to grant

retrospective planning permission in respect of the construction works already carried out and to adjourn the application in respect of intended future works. That resolution was embodied in a formal grant of planning permission in a letter dated 14 March 2024. On 10 April 2024, following representations made to the CPA by the NCC to the effect that the grant of planning permission was unlawful, the CPA resolved to modify its decision regarding the planning permission.

6. The CPA does not now dispute that the planning permission was granted unlawfully. The key issue between the parties is whether the CPA's decision dated 10 April 2024 is effective to revoke the CPA's earlier grant of planning permission.
7. The NCC argues that the CPA did not have power to revoke the planning permission on 10 April 2024 or that the decision did not have the effect of revoking the planning permission, so that the planning permission remains in force and must be quashed by the court. The NCC complains that the CPA should have consented to a quashing order, as the NCC proposed in a pre-action letter, which would have avoided the need for the NCC to pursue the proceedings, and for both sides to incur the associated legal costs.
8. The CPA's position is that its 10 April decision was effective to revoke the planning permission. It says that the application for planning permission is outstanding for determination as a result. The CPA therefore contends that this application for judicial review is academic and should be dismissed because the substantive relief sought by the NCC has been achieved by another route. If it fails on that point, the CPA argues that the NCC's claim should be dismissed on the merits because the 10 April decision was effective to rescind the planning permission and to adjourn the application for planning permission, which has still not been determined. The NCC accepts that if that is my conclusion, then there is no need for the Court to take any action.
9. By the time of the hearing before me, the question of enforcement action, or the lack of it, was not actively pursued, for reasons that I will come to later in this judgment.
10. The NCC was represented before me by Mr Chris Buttler KC instructed by Ms Kate McClymont of Nelsons Legal and the CPA was represented by Mr Tom Hickman KC instructed by Mr Vaughan Carter of Savannah Law. Bon Crepe Ltd was not represented and did not appear. I am grateful to all counsel for their helpful submissions and to the parties for their patience in waiting for this judgment.

11. The evidence before the court comprises affidavits and exhibits of Gina Ebanks-Petrie filed on behalf of the NCC, and affidavits and exhibits of Ian Pairaudeau and Haroon Pandohie filed on behalf of the CPA. Ms Ebanks-Petrie is the Director of the Department of Environment (“**the DoE**”) and a member of the NCC. Mr Pairaudeau is the Chairman of the CPA and Mr Pandohie is the Director of the DoP. Bon Crepe Ltd did not file any evidence in the proceedings. I record that, as is common in judicial review proceedings, there was no oral evidence and no cross-examination of deponents.

B. The facts

12. I make the following findings based on the documents in evidence. In doing so, I have sought to focus on the matters relevant to the current application for judicial review.

B.1 The role of the NCC

13. The NCC was established by s.3(1) of the NC Act. The NCC’s remit includes considering the environmental impact of projects that require planning permission. Section 7 of the D&P Act imposes a general obligation on the CPA to consult with relevant government departments and agencies having related aims or objectives. The NC Act superimposes additional consultation requirements. Under s.41(3) of the NC Act, and as set out in the NCC’s guidance notes, government bodies, including the CPA, are required to consult the NCC before taking any action likely to have an adverse impact on the environment. Secondly, if the government body concludes (whether as a result of consultation with the NCC under s.41(3) or otherwise) that the action in question would be likely to have an adverse impact on a protected area or the critical habitat of a protected species, it is required by s.41(4) of the NC Act to apply for and obtain the approval of the NCC before taking any action, which includes the grant of a permit or permission.
14. As required by s.41 of the NC Act, the NCC published Guidance Notes in 2015 to assist government bodies to comply with the consultation requirements of s.41 of the NC Act. The NCC published an updated version of the Guidance Notes in December 2023 to clarify the position following the decision of the Court of Appeal in Central Planning Authority v National Conservation Council (CICA No.22 of 2022).

15. The Guidance Notes identify certain triggers that the NCC considers are indicative of a risk to the environment or to a natural resource and therefore give rise to the duty on the government body under s.41(3) of the NC Act to consult the NCC before making taking any action. The triggers are of three kinds:
 - 15.1 location triggers – based on identified locations or types of locations;
 - 15.2 activity triggers – based on types of activity intended to be carried out; and
 - 15.3 strategic triggers – based on the formulation of national or sectoral policies or projects of specified kinds, likely to have widespread impact.
16. So far as relevant to this case, the location triggers identified in the Guidance Notes include activities in areas of primary habitat or critical habitat (as defined in a Conservation Plan); and the activity triggers include clearing, filling or excavation on land of one acre or more. It is not in dispute that the land affected by the road was designated by the NCC as an area of primary habitat or critical habitat and that construction of the road involved clearing, filling or excavation on land of one acre or more. At least two of the triggers in the NCC’s Guidance Notes requiring consultation with the NCC under s.41(3) of the NC Act were therefore activated in this case.

B.2 The construction of the road and the reactions of the DoE and DoP

17. In July 2019, the DoE became aware that work had commenced on construction of a road on land in East End. The land in question is between two protected areas, namely the Salina Reserve and the Colliers Wilderness Reserve in East End, Grand Cayman. The DoE considers that area to be extremely environmentally sensitive. The DoE advised the DoP that the road was being constructed and requested that the DoP take enforcement action to prevent further work. The DoP advised the DoE that no application for planning permission had been submitted but also expressed its view that the road was being constructed on a right of way and that planning permission was not required for clearing a right of way.
18. Mr Pandohie’s evidence is that in parallel with this, the DoP was in correspondence with the owner of land adjacent to that owned by Bon Crepe Ltd regarding clearing another part of the right of way. It does not appear that the DoP kept the DoE informed of this. That landowner indicated that they had initially been clearing the right of way by hand but had resorted to mechanical means and had then

been informed that planning permission was required. The DoP warned the landowner that they must get planning permission for any construction works in respect of the road and that all work should cease in the meantime. The DoP indicated that they were holding back on commencing enforcement action to allow the landowner to respond. Mr Pandohie says that the landowner ceased work.

19. The DoE continued to monitor the situation and sought legal advice regarding the DoP's stated position that there was no need for planning permission for work on the right of way. On 2 December 2019, the DoE complained to the DoP that the road construction had moved beyond the right of way. The DoE also forwarded an opinion from the Attorney General's Chambers that planning permission would be required for construction of a road, whether or not it is over a right of way. The opinion also stated that the DoP was required to consult the NCC pursuant to s.41(3) of the NC Act before granting any planning permission in respect of the road. The DoP did not respond to the DoE. At about the same time, Bon Crepe Ltd appears to have paused work on construction of the road.
20. In about July 2020, the DoP received complaints that work on construction of the road had recommenced. The DoP was unable to obtain access to conduct a site visit. At the DoP's request, the DoE obtained aerial drone imaging of the site in August 2020, which showed additional construction work that had been carried out. There is no evidence that the DoP took any action following receipt of the imaging.
21. It appears that work on the road was paused again until about May 2022. In May 2022, the DoE complained to the DoP that work to pave the road was taking place and sought an update on the DoP's investigations. The DoP did not respond.
22. In about February 2023, the DoE became aware that further work to the road was being carried out. The DoE was concerned that the road now appeared to extend into areas of protected mangroves. The DoE therefore issued an order under s.30 of the NC Act dated 23 February 2023 requiring Bon Crepe Ltd immediately to cease any "take" of blue iguana or mangroves as a result of the construction of the road in the absence of planning permission. Bon Crepe Ltd complied with this order and ceased work on the road. The DoE also wrote to the DoP on 23 February 2023 complaining about the further extension of the road, and seeking an urgent update from the DoP, including regarding any decision by the DoP not to pursue enforcement action. The DoP did not respond to the NCC to explain why it was not pursuing enforcement action.

23. On 27 February 2023, the NCC issued an Interim Directive under s.17(7) of the NC Act relating to the land over which the road had been constructed, which, amongst other things, required that planning permission or the permission of the NCC under s.20 of the NC Act be obtained for any clearing of that land. Bon Crepe Ltd applied to Cabinet on 22 March 2023 pursuant to s.17(8) of the NC Act disputing the NCC's position and requesting that Cabinet should direct the termination of the Interim Directive. Cabinet has not done so.
24. In the meantime, on 8 March 2023, a senior compliance officer within the DoP wrote on behalf of the Director inviting Bon Crepe Ltd to make a retrospective application for planning permission for the road.
25. On 12 July 2023, Bon Crepe Ltd submitted an application to the CPA for retrospective planning permission to allow the retention of the road, described as being approximately 2.03 miles in length, and also sought permission to build a 0.13 mile extension to the road and to install a gate.

B.3 The grant of planning permission on 14 March 2024

26. The CPA considered Bon Crepe Ltd's application for planning permission at its meeting on 13 February 2024. The DoE objected to the application. Its comments, which were before the CPA, included the following helpful summary of its overall position regarding the application:

"... This after-the-fact road is exceptionally environmentally damaging, having destroyed multiple protected species and having the potential to continually adversely affect the wild Blue Iguana population in perpetuity.

The site is situated within an extremely environmentally sensitive area. It is located between two protected areas, the Salina Reserve and Colliers Wilderness Reserve, both sites protected under the National Trust Act. This area has long been identified both nationally and internationally for its conservation value ... The Salina Reserve and Colliers Wilderness Reserve are the main release sites for captive-bred Blue Iguanas, which has been funded by millions of dollars of donations from individuals, organisations and corporate sponsors over time. ..."

27. The DoE complained about the accuracy of certain factual statements made and opinions expressed in the application – which Bon Crepe Ltd disputed in its own submission to the CPA. It is not necessary for the purpose of this case, which concerns the validity of the CPA's decision making, to go into the merits of the differences between the DoE and Bon Crepe Ltd.

28. The DoE set out its concerns about the adverse environmental impact of the road as follows:

“The adverse environmental impacts associated with the after-the-fact road can be grouped together into construction effects and operational effects.

The construction effects are as follows:

- *In the simplest terms, converting blue iguana habitat into a road means there is less blue iguana habitat. ...*

The operational effects are as follows:

- *The presence of a road will introduce more conflict with vehicles and most obviously in cases of Blue Iguanas being killed by vehicular impacts, will hinder or impede the movement of wildlife across the road.*
- *The road will provide easier access for cats and dogs to predate on Blue Iguanas impairing the capacity of the area to function as a habitat beneficial to wildlife.*
- *The road creates habitat fragmentation and creates substrate for the proliferation of invasive plant species which degrades the overall habitat.”*

29. The DoE concluded:

“Section 41(4) Considerations

The site is within designated critical habitat for the Grand Cayman Blue Iguana. The approval of the after-the-fact road and of the extension of the road would or would be likely to cause an adverse effect on the designated critical habitat ...

*On the basis of the above information and in accordance with the recent Court of Appeal judgement ... the Director of DoE considers it necessary for **the Central Planning Authority to apply for approval from the NCC under section 41(4) of the NCA prior to determining this application.**”*

30. The minutes of the CPA’s meeting on 13 February 2024 record the CPA’s decisions in materially identical terms to the letter dated 14 March 2024 containing the grant of planning permission. I therefore focus on the planning permission.

31. The planning permission set out in the CPA’s letter dated 14 March 2024 is in the following terms:

“Decision #1: *It was resolved to grant planning permission for the after-the-fact road construction which commenced circa. 2018/2019 and resumed at the end of 2022 and ceased on 24th February 2023, prior to the Interim Directive being issued on 28th February 2023, subject to the following conditions:*

- 1) *Unless specifically authorised **otherwise** in writing by the Central Planning Authority, the Development shall be carried out strictly in accordance with the approved plans.*
- 2) *The use of the after-the-fact road/trail is for recreational purposes only (ie no motorized vehicles, mechanical activity or maintenance). ...*

Reasons for the decision:

- 1) *The Authority acknowledged the comments from the Department of Environment regarding the potential adverse effects as they relate to construction and operation of the after-the-fact road/trail. Regarding the construction impacts, the Authority is of the view that the road/trail already exists and a decision to allow it to remain does not result in additional construction-*

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related adverse effects on the environment generally or on any natural resource. Regarding the operational impacts, the Authority has imposed a restriction on the approval that, subject to the outcome of the applicant's appeal to Cabinet, only recreational use of the road/trail is permitted and no vehicular activity, maintenance, construction etc is permitted without the prior consent of the Authority. The Authority considered other operation impacts raised by the DOE and found that, since the road exists, there are no additional conditions within the Authority's remit that it is able to impose regarding these impacts. Accordingly, no further referral of the after-the-fact road application to the National Conservation Council under the National Conservation Act s41(3) is required.

- 2) *After-the-fact development is permissible under the Development and Planning Act and Regulations. It is therefore acceptable and lawful in some circumstances as a means to regularize such development. In this case, the Authority is of the view that removing the after-the-fact road would not only require a separate application but would also be subject to review by the Department of Environment under Section 7 of the Development and Planning Act (2021) and based on the Department of Environment's Section 7 memorandum dated 29th September 2023, as the Authority has already concluded, that removal of the existing road would have greater adverse effect than leaving the existing road in situ."*

32. The CPA also made a second decision regarding the application for the construction of a further 0.13 mile extension to the road and the installation of a gate, as follows:

"Decision #2: It was resolved to adjourn the applications for the proposed road construction and gate pending the outcomes of the legal proceedings involving the applicant's appeal of the NCC's Interim Directive and the Court proceedings regarding DOE filing a charge against the applicant."

33. The 14 March 2024 letter concluded:

"The applicant is reminded that absolutely no further development activity on the site regarding clearing, road construction or maintenance etc is permitted without the prior consent of the Authority. In addition, while use of the property for agricultural purposes does not require an application for planning permission, no such use shall include any mechanical equipment or activity."

B.4 The NCC's response to the grant of planning permission

34. On 21 March 2024 the NCC's attorneys sent a pre-action protocol letter to the CPA. The letter complained that the NCC considered the grant of planning permission to be unlawful: (i) because the CPA did not consult the NCC as required by s.41(3) of the NC Act; (ii) because the CPA had not given sufficient reasons for rejecting the DoE's view that the CPA should refer the application to the NCC pursuant to s.41(4) of the NC Act; and (iii) because the CPA had taken into account its own opinion of how effective the conditions it applied to the planning permission would be in minimising the environmental impact, instead of considering the impact of the permission without those conditions and leaving it for the NCC to consider appropriate conditions, as per the scheme of s.41(5) of the NC Act.

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35. The NCC's attorneys indicated a potential solution to the situation for consideration by the CPA:

"7. The CPA wouldn't ordinarily be able to retake the decision under challenge because it is functus officio; however, it might be able to revoke the decision under section 17 of the Development and Planning Act. We invite you to consider whether this is possible and let us know your position."

36. The CPA informed the NCC that it would consider the matter again at its meeting on 10 April 2024.

B.5 The CPA's decision on 10 April 2024

37. The evidence does not include any formal decision letter similar to the 14 March 2024 letter containing the grant of planning permission. I therefore take the details of the 10 April decision and reasons for it directly from the minutes of the CPA's meeting on 10 April 2024. The 10 April decision was expressed as follows:

***Decision:** It was resolved that having regard to the Development Plan and other material considerations it is expedient to modify planning permission. Now therefore the Central Planning Authority in pursuance of Section 17 of the Development and Planning Act (2021 Revision) hereby orders that planning permission CPA/05/24; item 2.5 be modified as follows:*

- That said permission is hereby adjourned pending the outcome of the Applicant's appeal to Cabinet regarding the National Conservation Council's (the Council) interim directive dated 28th February 2023. Accordingly, the Authority hereby holds in abeyance any further consultation with the Council on this matter, pending the outcome of the said appeal.*

The applicant is reminded that absolutely no further development activity on the site regarding clearing, road construction or maintenance etc is permitted without the prior consent of the Authority. In addition, while use of the property for agricultural purposes does not require an application for planning permission, no such use shall include any mechanical equipment or activity

All other conditions of CPA/05/24; item 2.5 remain applicable."

38. The CPA's reasons for this decision were stated to be as follows:

"Reasons for this decision:

- 1) The Authority considered all information contained in the Agenda and Minutes of its meeting held on 13th February 2024 (CPA/05/24; item 2.5), including agency comments, applicant's submissions and representations, any objections and any other representations made pertaining to the application.*
- 2) For clarity, "adjourned" means there is no decision to approve or to refuse the application. The application therefore stands in abeyance pending the outcome of the cases referred to in the CPA's decision*
- 3) The Authority also referred to paragraph 38 of the Cayman Islands Court of Appeal (CICA) judgment (NCC v CPA) which provides:*

"Properly construed, therefore, adverse effect is to be assessed by the CPA, under both section 41(3) and section 41(4), prior to consideration of any conditions. The risk of harm posed by "any action" must be assessed prior to consideration of the conditions which might eliminate that risk."

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That paragraph clearly states that it is for the Authority to determine “adverse effect” [under] both sections 41(3) and 41(4) of the National Conservation Act. The CICA judgment merely provides that under the circumstances of the case, it was the Authority’s duty to consult or give clear and cogent reasons for not consulting further. In the case of the instant application, the Authority consulted under Section 7 of the Development and Planning Act (2021 Revision) and received the DOE’s very detailed reply. In accordance with the CICA ruling, and for reasons already stated herein (including the 13th February 2024 CPA minutes), the Authority enumerated both its consideration of the DOE’s comments and provided cogent reasons for not consulting further.

In the case of the after-the-fact applications for land clearing and after-the-fact road/trail construction, the Authority did not find any potential adverse effects, especially since the construction and operations work was completed.

- 4) *The Authority also considered the Letter Before Action dated 21st March 2024 from Nelsons Attorneys on behalf of the National Conservation Council.*
- 5) *The Authority specifically reviewed the submissions from the DOE and National Conservation Council contained in the Authority’s minutes of its meeting on 13th February 2024 (which for ease of reference have been included in these Minutes). The Authority concluded that these previous minutes clearly outline that the Authority considered the DOE/NCC submissions. Notwithstanding, in response to the Council’s threat of judicial review, the Authority agreed to modify its previous approval to adjourn the matter until Cabinet has ruled on the applicant’s appeal. Further, notwithstanding that all after-the-fact construction and operations activity had ceased **before** the Council’s interim directive was issued on 28th February 2023, the Authority determined in the circumstances, while the Applicant’s appeal of that directive is pending, any further consultation by the Authority with the DOE and/or NCC on this matter would be held in abeyance.”*

B.6 The NCC’s response to the CPA’s 10 April decision

39. On 25 April 2024, the CPA sent the NCC’s attorneys a copy of the minutes of its meeting on 10 April 2024. The NCC’s attorneys responded by letter dated 30 April 2024 complaining that the CPA’s 10 April decision was legally incoherent and that the CPA’s conclusion that there would be no potential adverse effects because the development had already been completed was itself unlawful. The NCC’s attorneys stated that they had concluded that revoking the planning permission under s.17 of the D&P Act was not open to the CPA.

40. In more detail, the NCC’s complaints were as follows:

“4. First, the CPA’s decision of 10 April 2024 is legally incoherent for the following reasons:

- a. *The grant of planning permission determined the application for planning permission. The only way that the application for planning permission can be reanimated is by revoking or quashing the planning permission. Given that the CPA has not revoked the planning permission, there is no extant planning application to ‘adjourn’ or ‘stand in abeyance’.*
- b. *Presumably the CPA did not revoke the planning permission because s.17(2) of the Development and Planning Act indicates that the power to revoke only exists before the operations authorized by the permission have been completed. In those circumstances, the only way of achieving the CPA’s objective of reanimating and adjourning the*

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application for planning permission would be to submit to an order quashing the grant of planning permission on the basis that it is functus officio.

5. *Second, the CPA could not lawfully conclude that there would be no potential adverse effects on the grounds the development had been completed because:*
 - a. *The policy of the law is to discourage the defiance of planning law. A person should not be permitted to evade the environmental safeguards provided by s.41 of the National Conservation Act simply by undertaking development in breach of planning control. Accordingly, before granting retrospective planning permission, the CPA must (under s.41 of the National Conservation Act) have regard to the environmental impacts of the development proposed to be authorized, such as the loss of habitat for blue iguanas.*
 - b. *Where (as here) development has taken place in breach of planning control, the Director of Planning has the power to issue an enforcement notice requiring the restoration of land (s.18 of the Development and Planning Act). Granting planning permission precludes the issuing of an enforcement notice against the breach of planning control. The decision to grant planning permission therefore constitutes a decision to forego the restoration of the land. In taking that decision, the CPA must comply with s.41 of the National Conservation Act. A decision to forego the restoration of the land would plainly have an adverse environmental effect. The CPA erred in failing to have regard to that effect pursuant to s.41(3) and s.41(4) of the National Conservation Act.*
 - c. *Further, '[b]y reaching its own, final, decision as to whether or not conditions will satisfactorily reduce or eliminate the risk of harm, the CPA subverts the plain intention of sections 41(4) and (5) which require the approval of the NCC and, in a case where conditions are proposed, require the NCC to make the final decision.'*
6. *In these circumstances, the NCC intends to issue an application for leave to apply for judicial review ...*
7. *We would respectfully invite you to limit the legal costs of our application for judicial review by submitting to the Grand Court quashing the planning permission and remitting the application for planning permission to the CPA. We consider that to be the only route to achieving the CPA's apparent intention of adjourning the application for planning permission."*

41. The CPA did not respond to this letter in the limited time available to it before the NCC filed its application for leave to pursue judicial review.

C. Summary of the parties' positions

C.1 The application for judicial review

42. The NCC filed its application for leave to pursue judicial review on 3 May 2024. Carter J gave leave to pursue the application on 21 May 2024 and the NCC filed its Notice of Originating Motion on 30 May 2024. Substantively, the Notice of Originating Motion seeks: (1) an order quashing both the grant of planning permission and the 10 April decision; and (2) an order requiring the director of the CPA to consider whether to pursue enforcement action in respect of the road.

43. The NCC's grounds for the relief sought are:

“D.1 Errors relating to section 41 of the National Conservation Act (2013)

46. *In granting planning permission on 14 March 2024, the First Respondent erred in that:*

- a. *First, it failed to consult the Applicant in accordance with s.41(3) of the National Conservation Act (2013). As the Court of Appeal explained, consulting the Applicant under s.7 of the Development and Planning Act (2021) was no substitute.*
- b. *Second, it misdirected itself on the question of adverse environmental impact. The First Respondent erroneously thought that it should disregard the environmental impact of the Road itself. By parity with the reasoning of the English Courts in the Ardagh Glass case, that would frustrate the purpose of s.41 of the National Conservation Act (2013) and would reward the developer's defiance of planning law.*

And/or

- c. *Third, the only rational view available to the First Respondent was that (compared to the remediation of the land pursuant to an enforcement notice) the Road had an adverse impact on the critical habitat of a protected species. It was therefore not open to the First Respondent to grant planning permission for the Road without the approval of the Applicant.*
47. *The Second Respondent erred in that he failed to make a decision on whether to require the remediation of the land by issuing an enforcement notice (and to consult the Applicant under s.41(3) before making any decision not to issue an enforcement notice).*

D.2 Errors relating to section 18 of the Development and Planning Act (2021)

48. *The First Respondent further erred in granting planning permission on 14 March 2024 in that:*

- a. *First, it misdirected itself that the removal of the Road and remediation of the land would require further planning permission. Remediation would not require planning permission – the ordinary way of remedying breaches of planning control is by requiring remedial action through an enforcement notice.*

And/or

- b. *Second, the First Respondent failed to confront the Applicant's position that removing the Road and remediating the critical habitat would be environmentally beneficial and/or failed to [give] cogent and compelling reasons to justify taking a different view.*

D.3 Errors in the purported modification of the planning permission

49. *The First Respondent purported to modify the planning permission on 10 April 2024 so as to render the planning application live and undetermined. In doing so, it misunderstood its powers. The only way to achieve the objective of reopening the planning application is for the Court to quash the permission. Modifying the permission could not legally have the effect that the First Respondent sought to achieve.”*

C.2 The CPA's response to the claim and the NCC's reply

44. On 29 July 2024, the CPA's attorneys wrote to set out the CPA's position in opposition to the judicial review. The letter focussed on the CPA's decisions made on 13 February 2024 and 10 April 2024. In relation to the CPA's 10 April decision, the letter asserted that the CPA has an unfettered power under s.17(1) of the D&P Act to modify an earlier decision, where the CPA considers it expedient and by reference to any material considerations. The letter argued that the NCC's pre-action protocol letter

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dated 21 March 2024 contained material considerations, which it was expedient for the CPA to take into account on 10 April 2024 and which justified the CPA modifying its earlier 13 February 2024 decision. Alternatively, the CPA could revoke or modify its 13 February 2024 decision under s.17(2)(a) of the D&P Act.

45. As to the 13 February 2024 decision, the CPA's position was that this case is distinguishable from the situation considered by the Court of Appeal in Central Planning Authority v National Conservation Council (CICA (Civil) Appeal No.22 and 25 of 2022) because it concerns an application for retrospective planning permission. The CPA argued that its approach to consultation with the NCC was permissible and the consultation that it carried out was sufficient.
46. In response to the NCC's claim that the Director of the DoP should be required to reconsider enforcement action, the CPA responded that whether or not to pursue enforcement was a discretionary matter for the Director. The CPA's attorneys noted that s.18(6) of the D&P Act provides that any enforcement notice is suspended if an application for planning permission is submitted. The CPA argued that it was therefore reasonable for the Director not to take any enforcement action once Bon Crepe Ltd had submitted its planning application in July 2023. The letter did not address why the DoP had not taken any enforcement action at any time between either: (a) July 2019, when it was considering enforcement action against the neighbouring land owner; or (b) December 2019, when it was provided with the advice of the Attorney General's Chambers that planning permission for the road was required; and (c) July 2023, when Bon Crepe Ltd submitted its application for retrospective planning permission following the CPA's invitation that it do so.
47. The attorneys for the CPA wrote again on 12 September 2024, following receipt of Ms Ebanks-Petrie's second affidavit. They invited the NCC to withdraw the judicial review claim and pay the CPA's costs of the proceedings. Their letter can be summarised as follows:
 - 47.1 They complained about the content of Ms Ebanks-Petrie's second affidavit, most of which they said is inadmissible.
 - 47.2 They complained about the timing of the NCC's application for leave to pursue judicial review, which they said did not give the CPA a reasonable time to respond to the NCC's letter of 30 April 2024, and they argued that the NCC could have delayed making its application until 10 July 2024.

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- 47.3 They argued that the judicial review of the grant of planning permission is academic because the decision to grant planning permission has been superseded by the CPA's 10 April decision.
- 47.4 They argued that the CPA had power to modify the grant of planning permission and summarised the CPA's position on the interpretation of s.17 of the D&P Act.
- 47.5 Finally, they argued that the judicial review of the modification decision is also academic because the claim serves no practical purpose. This was said to be because the effect of the modification decision is that Bon Crepe Ltd's application for planning permission is to be re-determined, which is precisely the relief that the NCC seeks, and further that the CPA has stated that it will consult the NCC before deciding the application.
48. The NCC's attorneys responded on 20 September 2024 rejecting the invitation that the NCC withdraw its claim. The letter argued the NCC's position in response to each of the points raised in the CPA's attorney's letter of 12 September 2024, but I do not consider it is necessary to set out those responses, which formed part of the argument before me. The letter concluded by inviting the CPA to consent to an order quashing the planning permission or a declaration that the 10 April decision amounted to a decision to revoke the planning permission, rather than to modify it.
49. However, following receipt of the CPA's skeleton argument, the NCC's attorneys wrote on 1 October 2024 indicating that they considered it was no longer possible to compromise the claim on the basis of an agreed declaration, which it said would involve the court making a declaration that is wrong in law. The NCC repeated its invitation to the CPA to agree to the planning permission being quashed.
50. The CPA did not accede to this invitation with the result that the matter proceeded before me on 16 and 17 October 2024.

D. Is the NCC's claim academic?

51. The CPA urges me to determine that the claim is academic as an initial issue, and that I should not rule upon the substance of the claim if that is the case. The CPA says that it was not able to raise this point when leave was sought from Carter J, because the application was determined *ex parte*, which is, of course, the usual situation in judicial review cases.

52. The CPA relies on the judgment of the Court of Appeal of Northern Ireland in *Bryson v Minister for Infrastructure & Anor* [2022] NICA 38, where the Court of Appeal at [14] expressly endorsed the judgment of Scoffield J at first instance in the following terms:

“[20] I do not consider that the failure of the proposed respondents to concede that they have acted unlawfully is the appropriate yardstick by which to judge whether or not the proceedings are academic. There are a range of ways in which applications for judicial review may turn out to no longer serve a practical purpose. Sometimes that will be because the respondent concedes the application in whole or in part. On other occasions, it may simply be because the relevant circumstances change or the decision in question ceases to have any practical effect. The mere fact that the underlying legal dispute has not been resolved does not mean that the proceedings should not be viewed as academic. The focus of the court’s enquiry on this issue will be intensely practical. It was characterised in the ex parte Salem case ... as whether there was any ‘longer a lis to be decided which will directly affect the rights and obligations of the parties inter se’ [underlined emphasis added].”

53. The CPA also relies upon the following statement in the judgment of Elisabeth Laing LJ in the English case of *R (L, M, P) v Devon County Council* [2021] EWCA Civ 358:

“50. Judicial review is a flexible and practical procedure. All remedies in judicial review are discretionary, including declarations (a substantial topic on which we received no distinct submissions). The Administrative Court has at its disposal a range of doctrines, with discretionary elements, to control access to its scarce resources. They include the doctrine that judicial review will not generally be available where there is a suitable alternative remedy, and its approach to timeliness. The discipline of not entertaining academic claims is part of this armoury. It enables the court to avoid hearings in cases in which, although the issue may be arguable, the court’s intervention is not required, because the claimant has obtained, by one means or another, all the practical relief which the court could give him. I incline to the view that the claims in these cases were academic, because the [Applicants] had obtained all the practical relief for which they had asked, that is, the issue of the final amended statements. There was still a potential issue between the parties about the construction of the Regulations, but it was no longer live. It was no longer live in these proceedings, whether or not it was possible, probable, or virtually certain that it would arise again in a future year. As a matter of judicial policy, the best way of controlling access to the court for claims such as these is the rigorous filter of the test in Salem.”

Salem referred to by Laing LJ is *R v Secretary of State for the Home Department, Ex p Salem* [1999] 1 AC 450.

54. Thirdly, Mr Hickman referred me to the judgment of Dove J in the English case of *R (Tewkesbury Borough Council) v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1775 (Admin) at [32]-[34]:

“32. ... I have come to the clear and concluded view that the court should not proceed to determine this application, as it does not fall within the class of exceptional cases where the determination of an academic dispute about the reasons for a decision, rather than the decision itself, is warranted. ... The reasons for me concluding that the court ought not to entertain this case are as follows.

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33. *Firstly, it is important in my view to take account of the specific statutory regime within which the decision which is under review was made. That statutory framework provides for a bespoke remedy in relation to appeal decisions of this kind within section 288 of the 1990 Act. That bespoke remedy is specifically one which can only be exercised by those who are a 'person aggrieved'. In designing the statutory review process it is clear, therefore, that Parliament had no intention to provide any form of remedy to a person who may have succeeded in an appeal for what they consider to have been legal errors on the route to winning. ...*
34. *I recognise that there is force in the submission ... that when the court faces a question of the interpretation of national planning policy it could be contended that the two conditions set out in para 36 of the Zoolife case [2008] LLR 136 might be satisfied. Interpretation of national planning policy is a question of law and not fact, and given its national coverage it is possible to contemplate that the point of interpretation will arise in a number of other similar cases. ... The two conditions are identified as examples of when exceptional circumstances might exist rather than as a test of exceptionality itself. ... The examination of whether or not this is an exceptional case ... must examine all of the circumstances in which the case arises."*
55. The CPA argues that the relief sought by the NCC of quashing the planning permission has been achieved by the CPA's 10 April decision. The CPA's position is that the planning application must be re-determined as a result of that decision, which is also what the NCC seeks, and that the CPA will consult with the NCC before making a decision on the application. The CPA prays in aid that Bon Crepe Ltd has not challenged the 10 April decision and is bound by it.
56. Mr Hickman contends that this is not a case where the court should, exceptionally, exercise its discretion to proceed with the judicial review because there is a good reason in the public interest to do so. He says there is no general point of law affecting other litigants that ought to be decided. He records that the NCC does not qualify as a "person aggrieved" for the purposes of an appeal under s.48 of the D&P Act, which he says is an indication of Parliament's intention of the proper role of the NCC, similarly to Dove J's comments in Tewkesbury Borough Council.
57. The NCC says that the judicial review is not academic because there is an unlawful planning permission in existence that should be quashed. The NCC relies on Tata Steel UK Ltd v Newport City Council [2010] EWCA 1626. The English Court of Appeal in that case was unanimous in allowing the appeal. Carnwath LJ, giving the leading judgment, said:
- “7. *The normal consequence of a permission being found unlawful in that way and certainly on grounds which are not merely technical, but go to the merits of the proposal would be that the permission would be quashed. That would leave the council free to re-determine the matter if they so wished on a proper basis or to consider some other way of dealing with the problem.*
8. *The judge did not take that course. He decided that he should look at the matter as a discretionary matter. ...*

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13. *I have not been in detail into his reasoning because it seems to me, with respect, that at this point in his judgment he went wrong in principle. He seems to have come down to treating this as though it were some sort of private law dispute between [the persons affected by the permission] and to be resolved by balancing the prejudice of the one against the other. Even on that analysis, I find his approach somewhat difficult to understand. ...*

15. *... In my view, it ignores the very important consideration, which is that a planning permission is a public act and if it is found to be unlawful the normal result is it should be quashed and the matter should be regularised. That is not simply a matter of concern to [the persons affected by the permission]. It is a matter of public concern. That is why there are plenty of authorities which say that a normal rule is that unlawful permission should be quashed."*

Mr Hickman for the CPA dismisses this point on the basis that all of the relevant authorities are predicated on the assumption that the underlying decision was unlawful.

58. In my judgment, Mr Hickman goes too far in his submission that this case must necessarily be determined to be academic, without reference to the fact that it involves an unlawful planning permission.

58.1 In *Bryson*, it is easy to see why the judicial review had become academic because matters had substantially moved on from the situation which had generated the application for judicial review. At paragraph [10] the Court of Appeal recorded the respondents' submission as follows:

"10. ... they argued that the central issue was not whether the Ministers' decision to issue proceedings was 'unlawful' but whether there should be a full judicial review when the matter was now of academic relevance only. The decision of the Ministers was inextricably linked to the factual matrix which underpinned the bonfire which had long since 'burnt itself out' as Scoffield J observed. Further judicial guidance was now available in JR169 [2021] NIQB 90 which should mean that those involved on each side of the bonfire dispute would no longer need to seek recourse to the courts. In all the circumstances, there was no public interest in having a further judicial review."

58.2 In *R (L, M, P) v Devon County Council* the respondent had produced amended education, health and care plans sought by the applicants, albeit late. The only issue was one of statutory construction as to the timetable by which the plans should have been provided. Notably, the Court of Appeal assumed, without deciding, that the judicial reviews were academic but concluded that the judge should have heard the judicial reviews nonetheless because the issue of construction potentially affected many other children and young persons who had education, health and care plans.

58.3 In *Tewkesbury Borough Council*, the applicant had successfully appealed against the grant of planning permission. However, the applicant wished to continue with the judicial review to challenge the planning inspector's reasoning and approach to one particular issue regarding

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national planning policy, rather than the overall outcome of the appeal. Dove J concluded that the claim was academic and refused to allow it to proceed. One of his reasons for doing so was that the planning inspector's decision on the appeal did not create a binding precedent and the planning policy in question could be reviewed in subsequent appeals by other planning inspectors, so that any guidance that the court might give would be of doubtful value. In addition, he noted that there was a separate specific route of appeal under s.288 of the English Town and Country Planning Act 1990, which was available to provide a remedy where the interpretation of planning policy had a decisive impact on the initial planning appeal decision.

59. I consider that the determination of whether the claim in this case regarding the planning permission is academic is intimately bound up with the question of the effect of the 10 April decision. Unless the 10 April decision is valid and has the effect that the CPA contends for, then in my judgment the judicial review is unlikely to be academic because an unlawful planning permission will remain in existence when it ought to be quashed. Given that a planning permission directly attaches to the land and enures until properly revoked or modified, I do not consider it is satisfactory simply to say that relief has been obtained in another way, unless that alternative relief itself has the effect of quashing the planning permission. In addition, I agree with the NCC's submission that further steps in the planning process will have to be taken in the future and it will be unsatisfactory if those future steps and decisions are founded on the continuing existence of a planning permission that is unlawful. I am supported in that view by the decision of the English Supreme Court in *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46 where Lord Reed discussed, particularly at paragraphs [29]-[31] that unlawful acts can still have legal consequences. I therefore defer further consideration of this question to deal with it as part of my discussion of the validity and effect of the 10 April decision.
60. Separately, the CPA argues that the second limb of relief sought by the NCC, namely that the Director of the DoP consider enforcement action, is redundant or academic given that the effect of Bon Crepe Ltd's planning application is that any enforcement action would be stayed pending determination of the application. The NCC does not expressly address this in its skeleton argument but did so in oral argument, and I return to this topic later in this judgment.

E. Was the grant of planning permission on 14 March unlawful?

61. The NCC maintains its position in the Notice of Originating Motion that the grant of planning permission was unlawful for the following reasons:
- 61.1 The CPA failed to consult the NCC under s.41(3) of the NC Act, when it was required to do so.
- 61.2 The CPA misdirected itself on the adverse environmental impact of the road in failing to compare the pre-development position against the post-development position and instead compared the post-development position with the position if Bon Crepe Ltd were required to remove the road.
- 61.3 The CPA should have concluded that the road had an adverse impact on the critical habitat of a protected species and the CPA was therefore prohibited from granting permission under s.41(4) of the NC Act without first obtaining approval from the NCC.
- 61.4 The CPA misdirected itself that the removal of the road and remediation of the land would require a separate grant of planning permission. This was wrong because removal of the road would be achieved as a matter of enforcement of planning control: see s.18(3) of the D&P Act:
“(3) Any [enforcement] notice ... may require the taking of such steps as may be specified for restoring the land to its condition before the development took place ...”
- 61.5 The CPA failed to give any cogent or compelling reasons to justify disagreeing with the DoE / NCC that removing the road and remediating the land would be environmentally beneficial.
62. In oral argument, Mr Buttler took me through the Court of Appeal’s decision in *Central Planning Authority v National Conservation Council* (CICA No.22 of 2022) to support the NCC’s argument that the CPA acted unlawfully in relation to its failures to consult the NCC and in failing to give cogent and compelling reasons for disagreeing with the DoE’s position that it would be environmentally beneficial to remove the road and remediate the land. He also made good the other matters relied upon by the NCC.
63. The NCC points out that the CPA does not dispute that the planning permission was unlawful for the reasons relied upon by the NCC. Mr Hickman did not seek to do so in oral argument either, and conceded that it was unlawful. However, he indicated that the CPA does not accept the validity of all of the NCC’s complaints and suggested that I do not need to express views on them.

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64. In those circumstances, I can take the question of the lawfulness of the planning permission shortly. In my judgment, the five criticisms of the CPA's decision making summarised above are each made out. Each of those failings of the CPA is sufficient to render the CPA's decision to grant planning permission seriously flawed, with the result that the grant of planning permission was unlawful.
65. Apart from the effect of the 10 April decision, the CPA does not put forward any reasons why some form of relief other than quashing the planning permission would be appropriate. Accordingly, subject to my analysis regarding the 10 April decision and whether the claim is academic, I conclude that the planning permission granted on 14 March 2024 should be quashed.

F. Is the 10 April decision valid and effective to revoke the planning permission?

F.1 The statutory context

66. I agree with Mr Buttler's submission that it is useful to consider certain wider aspects of the operation of the statutory scheme regarding planning control, which are relevant to this issue, before focussing on the dispute between the parties as to the proper interpretation of s.17 of the D&P Act and the effect of the 10 April decision.
67. The permitted use and development of land within the Islands is subject to a statutory scheme of control, set out in the D&P Act. The CPA exercises statutory powers given to it by Parliament (as does the Development Control Board in relation to the Sister Islands). They are creatures of statute and do not have inherent powers or jurisdiction beyond their statutory powers.
68. Section 13 of the D&P Act requires that permission is obtained for any development and defines the term "development", which is then used throughout the D&P Act:
- "13. (1) Subject to this Act or any regulations made under this Act, permission shall be required under this Part for any development of land ...
- (3) In this Act —
- 'development' means the carrying out of building, engineering or other operations in, on, over or under any land, the making of any material change in the use of any building or other land, or the subdivision of any land ...*"
69. By s.15(1) of the D&P Act, the CPA can dispose of a planning application in three ways:

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- 69.1 it can grant unconditional permission;
- 69.2 it can grant permission subject to conditions; or
- 69.3 it can refuse permission.
70. Section 15(3) of the D&P Act provides that a grant of planning permission is effective for 5 years and, where the development is commenced within the time permitted by the D&P Act or the specific planning permission (if different), the planning permission then enures for the benefit of the land unless revoked or modified. Planning permission is thus a valuable legal right attaching to the land for the benefit of the landowner from time to time and which can have a significant impact on the value of the land in question.
71. Section 16(1) of the D&P Act sets out supplementary provisions regarding grants of planning permission, namely that planning permission may be granted retrospectively, and states that references in the D&P Act to “*permission to develop land or carry out any development of land*” must be construed accordingly. Section 16(4) includes a similar provision to s.15(3) that permission granted under s.16 enures for the benefit of the land unless revoked or modified.

F.2 When can a planning application be re-opened?

72. Once the CPA has made a decision on a planning application, it has performed its statutory function, in other words, it is *functus officio*. This is a well-established legal concept. Mr Buttler relies on the judgment of Sir Douglas Frank, sitting as a Deputy Judge of the High Court, in Heron Corporation Ltd v Manchester City Council (1977) 33 P & CR 268 at 271-272:

“Certainly it can be said that the local planning authority is functus officio when it has given a decision on a particular application, and so the local planning authority here is functus officio in respect of the approval dated February 6, 1974; it could not change its mind and now refuse approval or attach further or different conditions to the approval already given.”

73. Mr Buttler also relies on an article by Nicola Gooch entitled “*Planning Decisions: A ‘proper whack’ mistake*” published in the *Property Law Journal* in October 2021, which summarises the position under English law as follows:

“This inability to easily correct administrative mistakes has a long legal history grounded in an old public law doctrine. The doctrine of ‘functus officio’ states that the decisions of officials are final and binding once they are made. They cannot be subsequently amended or revisited by the decision-maker (see R. v Secretary of State for the Environment Exp. Reinisch (1971)).

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In Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment (1985), the House of Lords held that planning legislation provided a complete and comprehensive statutory code of planning control. This code sets out the procedures by which permissions are granted and the mechanisms by which they can be revoked or amended. Outside of those express powers, a local authority, or indeed the Secretary of State, has no power to revisit or revoke a planning permission that has been granted (Connors v Secretary of State for Communities and Local Government (2017)). ...

As such, once a decision has been issued, the Local Planning Authority is unable to reverse it unless the decision is:

- *quashed by the High Court, as a result of a judicial review;*
- *formally revoked, using the council's powers of revocation; or*
- *in the case of a refusal, overturned at appeal."*

74. In the English case of *R (Gleeson Developments Ltd) v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1118, Sullivan LJ, giving the judgment of the Court of Appeal, said at [22]:

"22. ... If a planning permission has been granted, whether on appeal by the Secretary of State or by an appointed person, or on an application for planning permission by a local planning authority, there is no power to 'withdraw' that planning permission on the basis that there has been an administrative error at some stage in the decision-making process. Once granted, a planning permission may be revoked only under the procedure contained in sections 97–100 of the Act. Although Mr Swift criticised the claimant's reliance on the well known proposition that the planning Acts form what has been described as 'a comprehensive code', there can no doubt that they do comprise a very detailed and highly prescriptive legislative code. The code prescribes how planning permissions, once granted, can be revoked ..."

75. I agree with Mr Buttler that the common law concept of a decision maker being *functus officio* once they have made the decision which they are charged to make applies with equal force in the Cayman Islands. I also accept that the D&P Act provides a comprehensive code for planning control within the Islands such that the CPA's powers are defined by, and must be exercised within the scope of and for the purposes of, the D&P Act.

76. Thus, where planning permission has been granted, the application which led to that grant is spent. The CPA can only reconsider a planning application if the planning permission flowing from it ceases to exist. The available routes by which a planning permission granted by the CPA can cease to exist are:

76.1 where the CPA revokes the planning permission under s.17 of the D&P Act; or

76.2 where there is an appeal to the Planning Appeal Tribunal under s.48 of the D&P Act, which is allowed and the Planning Appeal Tribunal quashes the planning permission as a result; or

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76.3 where the Grand Court quashes the planning permission as unlawful on an application for judicial review.

Unless one of these has occurred, the planning permission remains in existence and the CPA has no power to re-open or reconsider the application for planning permission.

F.3 The difference between a resolution to grant planning permission and the planning permission

77. A resolution to grant planning permission is not the same as a formal grant of planning permission. It is an administrative decision and does not of itself create any rights. By contrast, a grant of planning permission creates substantive rights and attaches directly to the land. This proposition is derived from the English House of Lords decision in *R (Burkett) v Hammersmith and Fulham LBC* [2002] 1 WLR 1593, where Lord Steyn said at [38]-[39] and [42] (references omitted):

“38. ... it can readily be accepted that for substantive judicial review purposes the decision challenged does not have to be absolutely final. ... Town planning provides a classic case of this flexibility. Thus it is in principle possible to apply for judicial review in respect of a resolution to grant outline permission and for prohibition even in advance of it ... It is clear therefore that if Mrs Burkett had acted in time, she could have challenged the resolution. ... It does not follow from the fact that if Mrs Burkett had acted in time and challenged the resolution that she could not have waited until planning permission was granted and then challenged the grant.

*39. As a matter of language it is possible to say in respect of a challenge to an alleged unlawful aspect of the grant of planning permission that ‘grounds for the application first arose’ when the decision was made. The ground for challenging the resolution is that it is a decision to do an unlawful act in the future; the ground for challenging the actual grant is that an unlawful act has taken place. And the fact that the element of unlawfulness was already foreseeable at earlier stages in the planning process does not detract from this natural and obvious meaning. The context supports this interpretation. **Until the actual grant of planning permission the resolution has no legal effect. It is unlawful for the developer to commence any works in reliance on the resolution. And a developer expends money on the project before planning permission is granted at his own risk. The resolution may come to nothing ...***

*42. ... **In law the resolution is not a juristic act giving rise to rights and obligations. It is not inevitable that it will ripen into an actual grant of planning permission.**” (emphasis added)*

F.4 Revocation and modification of planning permissions – the statutory provisions

78. Section 17 of the D&P Act deals with revocation and modification of planning permissions. The first two sub-sections of s.17 provide as follows:

“17. (1) Subject to this section, if it appears to the Authority that it is expedient, having regard to the development plan and to any other material considerations, that any permission to develop land on an application made in that behalf under this Part should be revoked or modified, it may, by order, revoke or modify the permission to such an extent as appears to it to be expedient as aforesaid.

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- (2) *The power conferred by this section to revoke permission to develop land may be exercised—*
- (a) *where the permission relates to the carrying out of building or other operations, at any time before those operations have been completed; or*
 - (b) *where the permission relates to a change of the use of any land, at any time before the change has taken place and the power conferred by this section to modify permission to develop land may be exercised at any time; but the revocation or modification of permission for the carrying out of building or other operations shall not affect so much of those operations as has been previously carried out. ...”*

79. Section 17 therefore gives the CPA two distinct powers: a power to revoke a planning permission and a separate power to modify a planning permission. The NCC argues that the difference is that revocation causes a planning permission to cease to exist, whilst modification changes a planning permission but leaves it in existence.
80. On behalf of the CPA, Mr Hickman submits that the clause beginning “*but the revocation ...*” should not be read as a continuation of s.17(2)(b) but should be understood to qualify both s.17(2)(a) and s.17(2)(b), and should have been printed separately, below s.17(2)(b). As is apparent from my discussion of the construction and effect of s.17(2) later in this judgment, I do not need to express a concluded view on this particular issue.

F.5 Was the CPA’s 10 April decision a revocation or modification?

81. The first issue between the parties is whether the effect of the CPA’s 10 April decision should properly be construed to be a decision to revoke the planning permission or a decision to modify it.
82. The CPA argues that the terminology that it used to describe its 10 April decision is irrelevant and the Court should look at the substance of what the CPA did. Mr Hickman directed my attention to the *Judicial Review Handbook* (7th edition, Sir Michael Fordham) at paragraph 48.1.16 but it is useful to set out paragraph 48.1 first for context (citations omitted):

“48.1 Error of law/misdirection in law/illegality. The supervisory jurisdiction of the judicial review Court extends to correcting material errors of law and material misdirections in law. These are aspects of a broader concept of ‘legality’, which embraces ultra vires and breach of a duty. Questions of ‘law’ (and legality) are unlike questions of ‘judgment’, ‘appreciation’, ‘discretion’ and ‘policy’, since those questions are primarily for the public body to evaluate for itself, with a built-in latitude, so that review is ‘soft’. Questions of ‘law’ are frequently ‘substantive’, affecting the public authority’s impugned ‘substantive’ act rather than affecting the decision-making procedure. Questions of ‘law’ are subject to hard-edged redetermination afresh by the reviewing Court, applying an objective correctness standard. This reflects the Court’s responsibility as well as its expertise. It promotes the law and the rule of law. One

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important issue is whether a question is properly to be characterised as a question of ‘law’, which is itself a hard-edged question decided objectively by the reviewing Court. ...

48.1.16 Materiality: need for material error of law/material misdirection. ... *‘impossible for this court to conclude that, had the matter been approached in the right way, the decision ... would inevitably have been the same’; ‘The mere presence within [a] decision of an immaterial error of law does not make the decision itself one which is ... unlawful’; statements in a report as to ‘pure legal points’ having ‘no practical consequences’ for the claimant, meaning claimant raising ‘hypothetical questions of law, which do not require resolution’; ‘what must be shown is a relevant error of law, ie., an error in the actual making of the decision which affected the decision itself’ ...”*

83. The CPA submits that the substance of the 10 April decision was that it superseded the 13 February decision and should be construed as revoking the planning permission. In reliance upon Majera, the CPA says that the 10 April decision has binding legal effect unless and until quashed, and that its effect is clear. It argues that the way in which the CPA itself characterised the 10 April decision is irrelevant.
84. The NCC’s stance is that unless the 10 April decision was in fact and law a decision by the CPA to revoke the planning permission, then the planning permission remains extant and must be quashed. The NCC argues that the 10 April decision was not a decision to revoke the planning permission based on:
- 84.1 the wording of the 10 April decision;
 - 84.2 the CPA’s contemporaneous explanation of the nature of the 10 April decision; and
 - 84.3 the proper construction of the power to revoke or modify in s.17 of the D&P Act.
85. The NCC’s starting point is that the proper interpretation of the 10 April decision is an objective exercise for the Court: see Trump International Golf Club Ltd v Scottish Ministers [2015] UKSC 74 at [34]:

“34. When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. ...”

This was not challenged by the CPA.

86. In addition, I accept Mr Buttler’s submission that, because a revocation order destroys the legal rights derived from the planning permission in question, it is essential that any revocation order is unambiguously expressed and clearly intended to have that effect. This is so that: (a) there is clear legal authority for (i) the destruction of the affected person’s rights, and (ii) the interference with their right under the Bill of Rights to enjoyment of their property; and (b) so that the public at large know with complete clarity whether a document is destroying a property right or not.

87. The NCC relies on the wording of the 10 April decision and the reasons given by the CPA to explain that decision, which it says demonstrates that the CPA did not intend the 10 April decision to effect a revocation of the planning permission.

87.1 The NCC contends that the 10 April decision does not use the language of revocation. Instead, it repeatedly describes the decision as being one to “modify” its 13 February decision, as is apparent from my earlier quotation of the text from the CPA’s minutes. The NCC argues that the CPA consciously selected the modification power rather than the revocation power in s.17. Mr Buttler submits that this is supported by the fact that the NCC had suggested in its letter dated 21 March 2024 that the CPA consider whether it could use its power of revocation, and that the CPA used the modification power instead, so the CPA must have been aware of the distinction between the two.

87.2 Mr Buttler draws my attention to Mr Pairaudeau’s evidence at paragraphs 15–16 of his affidavit, where Mr Pairaudeau says:

“15. ... The Respondents have advised in correspondence sent by their attorneys on 29 July 2024 ... that the modification of the Initial Decision was in fact permitted under section 17 of the Development and Planning Act. ...

16. Firstly, it is asserted that the CPA has an unfettered discretion to modify in section 17(1) of the Development and Planning Act where it considers it expedient to do so, and that this discretion is not limited by subsection (2) of section 17 of the Development and Planning Act because this section only applies to revocations. The CPA therefore takes the view that, far from prohibiting any modification, a proper reading of section 17(1) and (2) of the Development and Planning Act supports this very action.”

Paragraph 16 of Mr Pairaudeau’s affidavit supports the NCC’s argument that the CPA made a conscious decision not to use its revocation power and instead to use its modification power because of the CPA’s interpretation of the effect of s.17(2).

87.3 In addition to the CPA’s use of “*modify*” rather than “*revoke*”, the NCC argues that other features also indicate, from an objective viewpoint, that the CPA did not intend to and has not revoked the planning permission:

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- (a) the 10 April decision was that “*permission is hereby adjourned*”, which the NCC says indicates that the planning permission granted on 14 March 2024 remains in place and has not been revoked – otherwise there would be nothing to adjourn; and
- (b) the CPA’s decision that the conditions to the planning permission should remain in place (which is a point relied upon in the CPA’s skeleton argument in support of its argument that the judicial review is academic) requires that the planning permission remains in existence because conditions cannot exist in a vacuum; they can only be attached to a planning permission: see s.15(1)-(2) of the D&P Act.

87.4 The NCC argues that, in particular, the second point above is fatal to the CPA’s case because the planning conditions could only continue to exist if the planning permission remains in existence; if the planning permission had been revoked, as the CPA now argues was the effect of its 10 April decision, there would no longer be any conditions that could remain applicable.

88. For the reasons advanced by the NCC, I conclude that the CPA’s 10 April decision was intended by the CPA to be a decision to modify the CPA’s earlier decision of 13 February 2024, not a decision to revoke the planning permission.

F.6 Was the CPA’s 10 April decision nonetheless legally effective to revoke the 13 February decision or the planning permission?

89. Mr Buttler points out that s.17 of the D&P Act gives the CPA power to revoke or modify a “permission”, it does not give a power to revoke or modify the earlier administrative decision that led to the grant of planning permission. This, he says, limits the scope of what can be done by way of modification order. Modification of a “permission” does not allow the CPA to turn a decision to grant planning permission into a decision not to grant planning permission and to adjourn the application. The power to modify a “permission” which is given to the CPA by s.17 is limited to changing the terms of the planning permission granted, for example by adding, varying or removing conditions attached to the planning permission.

90. Mr Buttler suggests that the CPA may have misunderstood that this is the effect of s.17 of the D&P Act, given that the CPA’s 10 April decision is squarely aimed at varying its decision made on 13 February 2024 to grant planning permission and does not purport to vary the terms of the planning permission itself. This is supported by Mr Pairaudeau’s use of the heading and definition “*The*

Modified Decision” in his affidavit and with the terms of the CPA’s response to the NCC’s pre-action protocol letter, where the CPA referred to “*an unfettered power ... to modify its previous decision*” and stated that the CPA decided that “*the Initial Decision would therefore be modified ...*”. The “*Initial Decision*” was defined in the letter as being the 13 February 2024 decision of the CPA, i.e. not the planning permission that was granted on 14 March 2024.

91. Thus, Mr Buttler says, by the 10 April decision the CPA erroneously sought to modify the 13 February 2024 resolution to grant planning permission so as to convert it into a decision to adjourn the application for planning permission. Such an action is not within the scope of the power to modify granted by s.17 of the D&P Act since it was directed at changing the resolution not at modifying the planning permission that was granted.

92. I accept Mr Buttler’s submission on behalf of the NCC that the 10 April decision was not effective to revoke the planning permission. In my judgment, the CPA’s 10 April decision was not legally effective to do so because:

92.1 the subject matter of the 10 April decision was a purported modification of the CPA’s 13 February decision, but s.17 of the D&P Act does not give the CPA power to modify that decision; and

92.2 nothing that the CPA purported to do by the 10 April decision was directed at modifying the planning permission that had been granted, i.e. the CPA did not validly exercise the power that s.17(1) of the D&P Act did grant to modify a permission.

93. It follows from this that I must reject the CPA’s submission that this judicial review is academic because the relief sought by the NCC has already been effectively achieved. My conclusion is that the NCC has not achieved the relief sought, and which it is entitled to. Because of the failure of the CPA’s 10 April decision to revoke the unlawful planning permission, that permission remains in place and must be quashed. Secondly, the CPA’s 10 April decision should also be quashed because the CPA purported to exercise a power that s.17 of the D&P Act did not give to it.

F.7 Did the CPA have power to revoke the planning permission? – The arguments

94. In light of my conclusion above, it is not strictly necessary for me to address the issue whether the CPA has power to revoke a grant of retrospective planning permission. However, I will do so because

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I heard detailed argument on it and in case my decision on this issue should become relevant if there is any appeal against this judgment.

95. The answer requires consideration of sections 17(1) and (2) of the D&P Act, which I set out again for convenience:

“17 (1) Subject to this section, if it appears to the Authority that it is expedient, having regard to the development plan and to any other material considerations, that any permission to develop land on an application made in that behalf under this Part should be revoked or modified, it may, by order, revoke or modify the permission to such an extent as appears to it to be expedient as aforesaid.

(2) The power conferred by this section to revoke permission to develop land may be exercised—

(a) where the permission relates to the carrying out of building or other operations, at any time before those operations have been completed; or

*(b) where the permission relates to a change of the use of any land, at any time before the change has taken place and the power conferred by this section to modify permission to develop land may be exercised at any time; but the revocation or modification of permission for the carrying out of building or other operations shall not affect so much of those operations as has been previously carried out.
...”*

96. The CPA’s argument is that the power in s.17(1) to revoke or modify a planning permission includes retrospective planning permissions, having regard to the wording of s.16(1) of the D&P Act. However, the limitations on the power to revoke in s.17(2) do not apply when the CPA is addressing a retrospective planning permission, so that the CPA has a wide power to revoke a retrospective permission unconstrained by s.17(2). The CPA says in its skeleton argument:

“34. Section 17(2), by contrast, does not refer to permission [to] ‘develop land’. It refers to permission for the ‘carrying out of building work’ or the carrying out [of] ‘other operations’. That language is forward looking and clearly indicative of works and operations that have not, at the time of the permission, been carried out. Those words do not embrace permission granted in reliance on s.16(1), i.e. after-the-fact planning permission. That is permission for the retention of works on land, not for the carrying out of works or operations, in contrast to permission granted in the ordinary way under s.15. This textual distinction reflects the evident purpose of s.17(2) ...”

97. Mr Hickman submits that s.17(2) takes a different approach to s.17(1) in that it intentionally adopts the language of s.15 of the D&P Act rather than the language of s.16, so that it is forward looking only. He contends that the limitations in ss.17(2)(a) and (b) are confined to revocation of prospective planning permissions, granted under s.15(1) of the D&P Act, and are not applicable to retrospective permissions under s.16(1). Mr Hickman justifies this construction on the ground that the purpose of s.17(2) is to discourage the CPA from changing its mind where the landowner has done works in

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reliance on a permission previously granted. But this consideration is not relevant in relation to retrospective permissions because the work was originally done in the absence of any permission and was always precarious. Accordingly, the CPA argues that its power to revoke the retrospective planning permission in this case is not limited by s.17(2).

98. In this regard, it is pertinent to note that s.17(3)-(5) of the D&P Act contain provisions regarding compensation following the revocation or modification of a planning permission, as follows:

“(3) Where permission to develop land is revoked or modified ... if ... it is shown that any person interested in the land has incurred expenditure in carrying out work that is rendered abortive by the revocation or modification, or has otherwise sustained loss or damage that is directly attributable to the revocation or modification, the [CPA] shall pay to that person compensation in respect of that expenditure, loss or damage. ...

(5) ... any expenditure incurred in the preparation of plans for the purposes of any work or upon other matters preparatory thereto shall be deemed to be included in the expenditure incurred in carrying out that work, but except as aforesaid no compensation shall be paid under this section in respect of any work carried out before the grant of the permission that is revoked or modified, or by reason of any other loss or damage ... arising out of anything done before the grant of that permission.”

Reading sub-sections (3) and (5) together, the result is that a landowner may seek compensation following the revocation or modification of a planning permission but such compensation is limited to expenditure incurred after the initial planning permission was granted and up to the date when the planning permission was revoked or modified (including the cost of preparing plans and carrying out preparatory works), i.e. costs incurred in reliance on or associated with the initial grant of planning permission. Compensation cannot be recovered for any work done or expenditure incurred before the initial grant of planning permission or after it was revoked or modified. It follows from this that compensation is not available where a grant of retrospective planning permission is subsequently revoked because there will not be any expenditure incurred by the landowner that falls within the scope of s.17(3)-(5).

99. The CPA submits that the compensation provisions in s.17 of the D&P Act are therefore consistent with its construction of s.17(2) in that a landowner cannot obtain compensation where a retrospective planning permission is revoked. The CPA’s argument appears to be that this is fair because the landowner took a risk in building without planning permission and should not be better off if planning permission, once granted, is then revoked returning the landowner to their original starting point but giving them the opportunity to claim compensation.

100. In response, the NCC contends that s.17(2) prevents the CPA from revoking a grant of retrospective planning permission at all. Mr Buttler argues that by virtue of s.16 of the D&P Act, “*references ... to permission to develop land or carry out any development of land, and to application for such permission*” are to be construed as including applications for retrospective permission. Thus:

100.1 The power to revoke or modify in s.17(1) applies to “*any permission to develop land*”, which covers both operational development and change of use. The use of “*any permission*” is sufficiently broad that it covers both prospective and retrospective permission, and this is consistent with s.16.

100.2 Section 17(2)(a) limits the exercise of the revocation power in the case of operational developments so that it cannot be used after the development is completed, and the concluding words after the semi-colon in s.17(2)(b) have the effect that any revocation cannot affect work that has already been carried out.

100.3 Similarly, s.17(2)(b) prevents the exercise of the revocation power in a change of use case where the change of use has already occurred. (The concluding words after the semi-colon in s.17(2)(b) are not relevant because change of use is a binary matter.)

100.4 The CPA’s argument that s.17(2) is limited to prospective planning permissions is wrong, both because of the effect of s.16 and also because the concluding words after the semi-colon in s.17(2)(b) expressly refer to work “*as has been previously carried out*”, which covers both work done before and after the grant of permission in question, and indicates that s.17(2) is intended to apply to retrospective planning permissions as well.

100.5 Retrospective permission may be given for a partly or fully completed development. Section 17(2) has the effect that revocation of a retrospective permission cannot be ordered where the development has been completed. Where the development has been partly completed, then the revocation power is not available in respect of the work that has been done up to that date.

100.6 The underlying policy reason is that it is one thing to deprive an individual of a valuable planning permission that has not yet been implemented, but quite another to require the removal of an operational development permitted after the fact or the cessation of a use of land regularised by permission after the event, and in circumstances where compensation under s.17(3)-(5) is unavailable.

100.7 It is right that the CPA should not be able to revoke a retrospective planning permission once granted because, when considering such an application, the CPA can see the development that

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has taken place and can make a fully informed decision as to whether it is in the interests of planning control for it to be retained. The CPA's decision in such a case should be final.

100.8 Accordingly, the CPA's powers under s.17 of the D&P Act did not permit it to revoke the retrospective permission for the road.

101. In addition, the NCC argues that the CPA has taken inconsistent positions on this point.

101.1 The NCC argues that the CPA appears to have concluded on 10 April 2024 that it did not have power to revoke the retrospective planning permission, which must be why the 10 April decision is framed as a modification order.

101.2 The NCC submits that Mr Pairaudeau's affidavit takes a similar approach.

101.3 However, the CPA's skeleton argument takes the opposite position and now argues that the CPA did have power to revoke the retrospective planning permission, and the effect of the 10 April decision was to do so.

102. Mr Buttler says that the CPA's argument requires a construction of s.17(2) that conflicts with s.16 and the concluding words of s.17(2)(b), and is impermissible in the context that the D&P Act provides a comprehensive code for planning. He relies on Lord Scarman's speech in *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132 at 140-141:

"Planning control is the creature of statute. It is an imposition in the public interest of restrictions upon private rights of ownership of land. The public character of the law relating to planning control has been recognised by the House in Newbury District Council v Secretary of State for the Environment [1981] AC 578. It is a field of law in which the courts should not introduce principles or rules derived from private law unless it be expressly authorised by Parliament or necessary in order to give effect to the purpose of the legislation. The planning law, though a comprehensive code imposed in the public interest, is, of course, based on the land law. Where the code is silent or ambiguous, resort to the principles of the private law (especially property and contract law) may be necessary so that the courts may resolve difficulties by application of common law or equitable principles. But such cases will be exceptional. And, if the statute law covers the situation, it will be an impermissible exercise of the judicial function to go beyond the statutory provision by applying such principles merely because they may appear to achieve a fairer solution to the problem being considered. As ever in the field of statute law it is the duty of the courts to give effect to the intention of Parliament as evinced by the statute, or statutory code, considered as a whole."

103. He also relies on *R (Lisle-Mainwaring) v Crown Court at Isleworth* [2017] EWHC 904 (Admin) to support his argument that the CPA's approach to construction is wrong. Gilbert J, addressing s.97 of the English Town and Country Planning Act 1990, which Mr Buttler says is in materially identical terms to s.17 of the D&P Act, said this:

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“33. The TCPA 1990 contains a range of powers enabling LPAs to alter existing planning permissions, to remove or alter buildings or cause uses to cease. All carry with them the duty of the LPA to pay compensation for the loss of the rights thereby removed or altered, if done retrospectively ... The powers under ... section 97 of the TCPA 1990 (revocation or modification of an extant permission) are prospective. ...

70. ... Subject to the restrictions imposed by the planning code (and any other relevant legislation or legal principle), the citizen is able to do anything, unless specifically restrained by law from doing so, whereas the state and its organs ... are only permitted to do something, including the restraint of activities of citizens, if expressly permitted to do so. ...

76. Under section 97 of the TCPA 1990 an LPA can issue a notice revoking or modifying a planning permission. However it cannot be used to remove works already carried out, or to revoke permission for a change of use which has already taken place. ...”

104. Mr Buttler submits that it is particularly inappropriate to read s.17(2) in a way that would adversely affect a landowners’ property rights by allowing revocation of permission for work already completed. He refers to *Bennion on Statutory Interpretation* at 27.6:

“[27.6] It is a principle of legal policy that by the exercise of state power the property or other economic interests of a person should not be taken away, impaired or endangered, except under clear authority of law. ... Even in cases where some degree of interference with a person’s proprietary rights is clearly intended, legislation will be construed as interfering with those rights no more than the statutory language and purpose require. ... Many decisions illustrate the reluctance of courts to countenance statutory interference with property rights unless there is clear authority to do so.

Expropriation

Perhaps the most severe interference with property rights is expropriation, where the courts are particularly likely to impose a strict construction.”

105. Mr Buttler argues that the CPA’s analysis would drive a coach and horses through the protection afforded by section 17(2) of the D&P Act. He poses the following scenario to illustrate the flaw in the CPA’s argument: a developer erects a dwellinghouse, obtains retrospective planning permission and then sells it to a purchaser. If the CPA were correct, it could make a revocation order at any time, rendering the house in breach of planning control. The Director of the DoP could then serve an enforcement notice under s.18 requiring the house to be demolished, and the innocent homeowner would not be protected by s.17(2) and would not be entitled to compensation under s.17(3)-(5).

F.8 *Did the CPA have power to revoke the planning permission? – Decision*

106. Having set out the parties’ arguments at some length, I can deal with my decision on this point quite shortly.

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107. I start by recording that I disagree with Mr Hickman's submission in paragraph 34 of the CPA's skeleton argument that s.17(2) does not refer to "*permission to develop land*", it clearly does so in the opening words of s.17(2). I consider that the proper interpretation of s.17 is that s.17(1) creates the powers to revoke or modify a permission to develop land, and that s.17(2)(a) and (b) then address how those powers are to be exercised in relation to revocation and as regards the two types of permission to develop land identified within the D&P Act, namely operational development and change of use development. Sections 17(2)(a) and (b) exhaustively address the circumstances in which the power to revoke a planning permission can be exercised. The statutory purpose of ss.17(2)(a) and (b) is demonstrated by the opening words of s.17(2), namely: "*The power conferred by this section to revoke permission to develop land may be exercised ...*", with the approaches to the two different kinds of possible development then set out.
108. I therefore prefer the NCC's argument as to the proper construction of s.17 of the D&P Act, and I adopt Mr Buttler's submissions as summarised in paragraphs 100, 102, 103 and 104 above.
109. The result, in my judgment, is that the CPA did not have power under s.17 of the D&P Act to revoke the retrospective planning permission for the road. Thus, even if I am wrong about the true effect of the 10 April decision, and it should properly be construed as a decision by the CPA to revoke the planning permission, the 10 April decision was unlawful because the CPA does not have power under s.17 of the D&P Act to revoke a retrospective planning permission.

G. Did the NCC issue its claim precipitously and unnecessarily?

110. The CPA complains that the NCC filed its application for leave giving only 2 days' notice to the CPA. It says that the NCC had 3 months to challenge the 10 April decision. It suggests that the parties could have used that time to agree a way forward that protected the NCC's position in relation to the planning permission, for example the CPA agreeing not to rely on any delay or not opposing any application for an extension of time.
111. There are two answers to this. The first is that the CPA and the NCC could have reached any appropriate agreement after proceedings had been commenced just as much as they could have done before proceedings. They did not do so, which indicates to me that the CPA's suggestion that additional time would have had the result that something could have been agreed to avoid these

proceedings is a vain hope. In other words, I am not satisfied that the timing of the NCC's application has had any impact on the conduct of the dispute or these proceedings. The CPA has staunchly defended its position that quashing of the admittedly unlawful planning permission was not required, when I have concluded that it is, and rejected proposals from the NCC that it voluntarily submit to a quashing order.

112. The second answer is the overall policy towards speedy resolution of judicial review proceedings, which has recently been reiterated in several cases before the Grand Court. The NCC is correct to submit that leave for judicial review must always be sought promptly, and that an applicant who delays risks being shut out of pursuing their claim for that reason. The 3-month time limit for applying in GCR O.53, r.4 is a long-stop; the overriding criterion is that the application must be made "*promptly*". In my judgment, and against the background of the extensive pre-action correspondence between the parties, it was reasonable for the NCC to have made its application for leave when it did. I also note that the relevant act giving rise to the need for judicial review was not the 10 April decision but the unlawful grant of planning permission on 14 March 2024, so that just over 7 weeks had elapsed by the time the NCC made its application or nearly 2/3 of the time permitted by GCR O.53, r.4 for making an application. In addition, the CPA did not respond substantively to the NCC to set out its position in response to the NCC's complaints until nearly 3 weeks after the date when the CPA contends the NCC should have waited to file its application for judicial review, which undermines the CPA's suggestion that the NCC acted precipitously.

H. Should the Director of the DoP be required to pursue enforcement action?

113. The CPA now appears to accept that its view that construction of the road did not require planning permission because it concerned work on an existing right of way was legally wrong. Section 13 of the D&P Act sets out exceptions to the general rule that any development requires planning permission. Those exceptions clearly do not include construction work on a right of way. Accordingly, the DoP should have been considering throughout the entire period from July 2019 onwards whether it was appropriate to pursue enforcement action in relation to the construction of the road.
114. Mr Pandohie's evidence on why the DoP did not take enforcement action is that:

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“14. During this time, the compliance staff in the Department of Planning and the Deputy Director remained actively engaged with both the landowners [of the adjacent land] and the Department of Environment. The investigation did not however reach any conclusion and, consequently, there was no file submitted to me for the consideration of any enforcement action against ... the landowners of these Parcels. To be clear, therefore, I did not make any decision not to pursue enforcement action in this matter.

15. This investigation was also impacted by the onset of the COVID-19 pandemic and staff shortages on the Compliance Team (the Compliance Officer with responsibility for this investigation left the Department of Planning in early April 2021 and there was no immediate replacement), and there has been no final conclusion. The matter was not considered to be a priority in the intervening period, and, notably, it was only much more recently that these Parcels assumed greater importance, following their designation as Critical Habitat by the Applicant on 27 February 2023 and the notification of the same by Governmental Departmental Notice on 13 March 2023 ... Until this time, the extent of the ‘sensitivity of the land’ was not therefore known. Indeed, the Department of Environment had previously noted that the basis for the Department of Environment’s concerns was simply that this land was ‘primary habitat’ ... not that it was ‘Critical Habitat’ for the Grand Cayman Blue Iguana {Cyclura lewisi) as was latterly identified in Interim Directive. ...

30. Insofar as any Enforcement Action is concerned, ... I was not presented with any findings from the investigation for me to consider enforcement action; but this was understandable in circumstances where the Interested Party had submitted the Planning Application, and where, in my view, it was more efficient for this process to run its course, particularly since any enforcement action would have been put on hold once the Planning Application had been submitted.”

115. This is to be contrasted with the evidence submitted by Mr Pandohie that enforcement action was threatened in July 2019 against the landowner in respect of work on the right of way over land adjacent to that owned by Bon Crepe Ltd: see paragraph 18 of this judgment. Further, Mr Pandohie’s evidence in paragraph 30 of his affidavit appears to relate to the period from July 2023 onwards only.

116. The reasons proffered by Mr Pandohie for not taking enforcement action are therefore unconvincing, particularly against the background of the DoE repeatedly requesting the DoP to do so from July 2019 onwards. However, none of the parties sought to argue before me the second limb of the relief sought by the NCC’s Notice of Originating Motion, namely that I should order the Director of the DoP to consider enforcement action against Bon Crepe Ltd. I therefore do not make any finding regarding the adequacy of the DoP’s reasons and do not make any order regarding enforcement action.

117. The parties took this stance for the following reasons:

117.1 As previously indicated, the CPA’s position is that enforcement action taken now would be of no utility because any enforcement would be stayed as a result of Bon Crepe Ltd’s application for planning permission.

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117.2 Mr Buttler explained in oral argument that, provided that the 5-year time limit for enforcement action in s.18(1) of the D&P Act is not exceeded, the NCC is content with the CPA's approach of deferring consideration of any enforcement action until Bon Crepe Ltd's planning application has been determined (or redetermined). This is on the assumption that the time limit runs from the date when the work was completed, i.e. in February 2023, and will expire in February 2028.

118. The language of s.18(1) of the D&P Act is not entirely clear as to when the 5 years starts to run. It states:

"18.(1) If it appears to the Director that any development of land has been carried out ... without the grant of permission ... or that any conditions ... have not been complied with, then the Director may, within five years of such development being carried out, or ... within five years after the date of the alleged failure to comply ..."

The uncertainty is over the meaning of "carried out", in other words does time under s.18(1) run from commencement of the work or from completion? Mr Buttler told me that in the UK it is well established that time for enforcement action under the Town and Country Planning Act 1990 runs from when the development is substantially complete. The D&P Act is largely based on that UK legislation, so that the NCC is comfortable that s.18(1) is likely to be interpreted in the same way as in the UK.

119. That is not something that I have to decide. However, it seems to me that if the DoP were to issue an enforcement notice now, even though no action could be taken until Bon Crepe Ltd's planning application were determined, it would still stop the clock for immunity in case the NCC's interpretation of when time runs under s.18 were to be incorrect. I echo the words of HHJ Mole QC (sitting as a Deputy Judge of the High Court) in *Ardagh Glass Ltd v Chester City Council* [2009] EWHC 745 (Admin) at [46]-[47]:

"46. Mr Rose, a concerned local resident, in his witness statement, said that it would be disgraceful if the Quinn Glass development were to achieve immunity because enforcement action was not taken in time. I entirely agree with him. It would be a betrayal by the planning authorities of their responsibilities and a disgrace upon the proper planning of this country. ... This is an important factor in the planning authority's consideration of the expediency of taking enforcement action and one which strongly suggests a cautious or precautionary approach.

47. Expedience as a test suggests the balancing of the advantages and disadvantages of a course of action. The advantage of taking enforcement action by issuing an enforcement notice is that it will at once prevent immunity arising at least for another four years ..." (emphasis added)

The same sentiments apply with equal force in the Islands.

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I. Costs and consequential matters

120. Within 14 days of handing down of this judgment, counsel should indicate: (a) whether they wish to be heard on costs and any consequential matters, providing their agreed available dates and time estimate for a hearing; or (b) whether they will submit written submissions on those points within 14 days. In either case, counsel should provide a draft order, agreed if possible, in advance of the hearing or with their written submissions.

Dated 5 February 2025



**THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT**