



IN THE GRAND COURT OF THE CAYMAN ISLANDS  
IN THE CIVIL DIVISION

CAUSE NO: G 207 OF 2021

BETWEEN:

THE QUEEN  
On the application of  
NATIONAL CONSERVATION COUNCIL

Applicant

AND

THE CENTRAL PLANNING AUTHORITY

Respondent

AND

CAYMAN PROPERTY INVESTMENTS LTD

Interested Party

IN OPEN COURT

Appearances: Mr Christopher Buttler QC and Kate McClymont of Nelsons for the Applicant

Mr Ian Paget Brown QC and Samuel Jackson and Selina Tibbets of Jackson Law for the Respondent

Mr Tom Lowe QC and Mr Michael Alberga of Travers Thorpe Alberga for the Interested Party

Before: Hon Mr Justice Alistair Walters, Actg.

Date of Hearing: 14-15 June 2022

Draft circulated: 3 August 2022

Judgment Delivered: 23 August 2022

HEADNOTE

Sections 3 and 41 of National Conservation Act. Intention of Parliament when enacting NCA. Power of NCC to delegate its functions under s.41. Power of NCC to delegate those functions to the Director of the Department of Environment. Extent to which Government entities have any discretion under s.41(4) as to whether to apply to the NCC prior to taking any action that may have an adverse effect on the environment. Meaning of "direct" in s.41(5).

JUDGMENT

Introduction

1. These proceedings relate to a dispute between the Applicant (the "NCC") and the Respondent (the "CPA") in relation to aspects of their respective statutory powers and roles. The question as to the extent of those powers and roles arises in circumstances where the CPA is considering an



application for planning permission which is likely to have an adverse effect on the environment, when the NCC becomes involved in that process and whether the NCC has the power through the Director (the “Director”) of the Department of Environment (the “DOE”) to impose conditions on the grant of planning permission or to direct the CPA to refuse the application for permission. The issues raised in this case apply not just to the CPA but all government entities.

2. This case has attracted much public interest and it is important to bear in mind that the Court is not being asked to consider or review any issues or decisions that relate to the environment itself. As explained above, the case is very much focused on legal issues. It is also important to bear in mind that the issues raised in this case apply not just as between the NCC and the CPA but as between the NCC and all Government entities<sup>1</sup> where similar environmental issues arise. Therefore, the principles covered by this judgment are of more general application than just to the facts of this case.
3. The Interested Party is the owner of property situated at the northern end of Boggy Sands Road (registered with the Cayman Islands Land Registry as Block 5B Parcel 162) (the “Property”). It is in the context of an application for planning permission in relation to the Property that was considered by the CPA in September 2021 (the “Application”) that this dispute arises.
4. The proceedings involve an application by the NCC for an order quashing the decision of the CPA to grant planning permission in relation to the Property, notwithstanding the objection of the NCC.
5. During the course of the hearing, counsel for the NCC and CPA made it clear that the parties were not engaged in these proceedings in an adversarial way but rather were placing the various issues before the court in order that they may be resolved, thus clarifying the legal relationship between the two bodies.

### **Background to the role and function of the NCC and CPA**

6. The NCC was established by virtue of s.3 of the National Conservation Act 2013 (the “NCA”<sup>2</sup>) and consists of 13 voting members. Section 3(9) of the NCA sets out the functions of the NCC.

*“(9) The Council has the following functions -  
(a) subject to this Law, managing and making recommendations on the use of the Fund;*

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<sup>1</sup> Defined in paragraph 11 below.

<sup>2</sup> Save where otherwise stated, references to sections are to sections of the NCA.

- (b) promoting the biological diversity and the conservation and sustainable use of natural resources in the Islands;*
- (c) co-ordinating the establishment and adoption by the public and private sectors of national policies for the conservation and sustainable use of natural resources, including -
  - (i) the use of wetlands and wetland resources; and*
  - (ii) the excavation of aggregate and fill materials;**
- (d) recommending and maintaining protected areas and conservation areas and conserving, maintaining and restoring their natural resources in accordance with Part 3;*
- (e) conserving, maintaining and restoring populations and critical habitats of protected species in accordance with Part 4;*
- (f) promoting the training of professional and voluntary personnel in the fields of research, management and wardening of protected areas and species and the other natural resources of the Islands;*
- (g) promoting wider understanding and awareness of the significance of the ecological systems of the Islands, the benefits of conserving natural resources and of the provisions of this Law and the Conventions;*
- (h) publicising the establishment of protected areas and the designation of protected species and raise public awareness, through educational programmes and other means, of the significance and value of protected areas and species and of the benefits that may be gained from them;*
- (i) encouraging public involvement, particularly by local communities, in the planning and management of protected areas and the conservation of protected species;*
- (j) promoting the adoption of guidelines by entities for the integration of conservation issues into their decision making processes and for the achievement of the sustainable use of natural resources;*
- (k) promoting district, national and regional initiatives, including co-operative enforcement measures and mutual assistance in the enforcement of national laws, in order to further the objectives of the Conventions;*
- (l) promoting national plans for emergency responses to activities or events, whether caused naturally or not, that present a grave and imminent danger to biological diversity and encouraging international co-operation to supplement such national plans;*
- (m) promoting national plans for the sustainable management, conservation and enhancement, as appropriate, of sinks and reservoirs of greenhouse gases; and*
- (n) carrying out such other functions and duties as are specified under this Law and the regulations.*
- (10) In carrying out its powers and duties the Council may, subject to any directions of the Cabinet, enter into agreements and other co-operative arrangements with regional agencies, interstate agencies, voluntary organisations and other persons for the purpose of this Law and the Conventions.*
- (11) Without prejudice to the generality of subsection (10), arrangements pursuant to the subsection may provide for —
  - (a) the regulation, promotion and co-ordination of surveys and research relating to natural resources;*
  - (b) the conservation of particular species pursuant to Articles IV and V of the Migratory Species Convention;**

- (c) *the establishment and operation of joint or regional conservation plans or management bodies for protected species;*
  - (d) *the taking of joint or harmonised enforcement measures in respect of any laws relating to protected species or their critical habitats; and*
  - (e) *the establishment of contingency plans for emergency responses to activities or events that present or may present a danger to biological diversity in the Wider Caribbean.*
- (12) *The Council, subject to any directions of the Cabinet, may make orders and guidance notes and issue directives for the purpose of giving effect to the provisions of this Law and such orders, guidance notes and directives may include —*
- (a) *criteria for identifying endangered or threatened species or other species needing protection under this Law;*
  - (b) *criteria for evaluating proposals for the establishment and management of protected areas and for the measures required to protect and conserve protected species and their critical habitat;*
  - (c) *criteria for the application for, and grant of, monies from the Fund;*
  - (d) *criteria for the review, assessment and reporting of activities funded in whole or in part by monies from the Fund;*
  - (e) *the form and content of a petition under section 16(3);*
  - (f) *procedures for determining the circumstances under which permits and licences may be granted under Part 5;*
  - (g) *measures governing the methods and conditions under which the captive breeding or artificial propagation of protected species may be allowed;*
  - (h) *procedures for regulating and controlling wild populations and the import, introduction, possession, transportation and release of alien or genetically altered specimens;*
  - (i) *procedures for consultation by entities pursuant to section 41(3); and the carrying out of environmental impact assessments under section 43.*
- (13) *The Council may delegate any of its functions, other than the making of orders and the issuing of directives, to the Director or to any committee or sub-committee of its members.”*

One of the main issues arising at the hearing was the extent to which s.3(13) permits the NCC to delegate its powers to the Director. Much of the argument turned on the meaning of the words “orders”<sup>3</sup>, “direction”<sup>4</sup> and “directives”<sup>5</sup> which I will come back to in due course.

7. The DOE is responsible for “*promoting the biological diversity and the conservation and sustainable use of natural resources in the Islands*”<sup>6</sup>. The Director has a statutory responsibility to administer and enforce the NCA<sup>7</sup>. Her statutory functions include identifying protected areas and

<sup>3</sup> Not defined in the NCA.

<sup>4</sup> Under section 2 NCA “*means a direction made by the Cabinet under this Law*”.

<sup>5</sup> Under section 2 NCA “*means a directive made by the Council under this Law and includes an interim directive under section 11(3) or 17(7)*”.

<sup>6</sup> Section 3(9)(b) NCA.

<sup>7</sup> Section 6(1) NCA.



areas of critical habitat<sup>8</sup> and researching and monitoring impacts on the natural resources, habitats, species and populations of protected areas<sup>9</sup>.

8. Section 3 and schedule 2 to the NCA provide for its composition as follows:

*“1. (1) The Council shall consist of the following voting members-*

- (a) the Director or his nominee from the Department of the Environment;*
- (b) the Deputy Director of Research in the Department of the Environment;*
- (c) the Director of the Department of Agriculture or his nominee from the Department of Agriculture;*
- (d) the Director of Planning or his nominee from the Department of Planning;*
- (e) a person nominated by the National Trust and appointed by the Cabinet; and*
- (f) eight persons appointed by the Cabinet, at least four of whom shall have relevant scientific or technical expertise.”*

9. It seems that the intention of the legislature was to make the Director and members of the DOE an integral part of the NCC and its decision making process, albeit not a majority of the members given a vote under the NCA<sup>10</sup>.

10. Pursuant to s.11 of the NCA the NCC has power to take protective measures by issuing directives.

*“Protective measures*

*11. (1) A management plan may contain directives consistent with the provisions of the plan for the prohibition or regulation, including management and licensing, of activities within the protected area.*

*(2) Without prejudice to the generality of subsection (1), directives made under this section may —*

- (a) prohibit or regulate the entry of persons, animals or vehicles;*
- (b) prohibit or regulate vessels so far as may be consistent with rights of passage and navigation under international law;*
- (c) prohibit or regulate any activity that is likely, individually or cumulatively, to harm or adversely affect a protected area or that is otherwise not compatible with the purposes for which a protected area was established;*
- (d) prohibit or regulate the dumping or discharge of waste or other substances;*
- (e) prohibit or regulate the taking of specimens;*
- (f) prescribe measures to protect, conserve and restore natural processes and ecological systems within a protected area, including the protection of water lenses, water flow, seasonal wetlands, sinks, reservoirs, soil and subsoil integrity and the seabed;*
- (g) prescribe measures to protect, conserve and restore wildlife populations;*
- (h) prescribe the types of development that would be compatible with the purposes for which a protected area was established or prohibit or*

<sup>8</sup> Section (2)(c) NCA.

<sup>9</sup> Section 6(2)(d) NCA.

<sup>10</sup> The question as to whether the NCC is subject to the Public Authorities Act which prohibits civil servants on the boards of public authorities from voting, as argued by the Respondent, is dealt with later in this judgment.  
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*regulate any development, construction or building, including roads, public works or utility services, that might adversely affect a protected area;*

- (i) prohibit or regulate any archaeological activity, including the removal, damage or disturbance of any object that could be considered an archaeological object;*
  - (j) prohibit or regulate any activity involving the exploration, exploitation or modification of the soil, subsoil integrity or the seabed;*
  - (k) impose fees for entry into or the use of a protected area or for any licence or permit for activities in a protected area; and*
  - (l) create zones within a protected area for the purpose of prohibiting, restricting or permitting specified activities within a particular zone.*
- (3) Until such time as a management plan has been adopted for a protected area, the Council may, on the advice of the Director, issue such interim directives as the Council considers to be urgently required to protect the area, including any of the measures set out in subsection (2).*
- (4) The Council shall report the making of an interim directive under subsection (3) to the Cabinet and the directive shall cease to have effect on the commencement of a management plan for the protected area concerned or at such earlier time as the Council or the Cabinet may direct.”*

11. The specific power that the NCC sought to exercise in this case through delegation to the Director is that arising under s.41. Section 41(1) states:

*“General obligations*

- 41. (1) Subject to subsections (2), (3) and (4), every entity shall comply with the provisions of this Law and shall ensure that its decisions, actions and undertakings are consistent with and do not jeopardise the protection and conservation of a protected area or any protected species or its critical habitat as established pursuant to this Law.”*

The definition of “entity” is “any body of the government and includes the Cabinet, any ministry, portfolio, statutory authority, government company or any other body which exercises a public function”.<sup>11</sup> This includes the CPA. The definition of “protected area” includes Seven Mile Beach to which the Property is immediately adjacent. “[P]rotected species” means a species referred to in s.15 which, in turn refers to Parts 1 and 2 of Schedule 1 to the NCA. Part 1 includes marine mammals, marine turtles, corals, anemones and sponges.

12. In the case of the Application in relation to the Property, there is no dispute that, by virtue of s.41(1), the CPA had a statutory duty to ensure that it did not breach the provisions of the NCA.

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<sup>11</sup> Section 2 of the NCA.



13. Section 41(2) provides as follows:

*“(2) For the purposes of subsection (1) the Council shall formulate and issue guidance notes to entities on their duties under this Law, and any action taken in full accordance with such guidance shall be deemed to be in compliance with this Law.”*

14. The NCC has issued guidance to entities (“Guidance”). The Guidance, entitled: *“National Conservation Council Guidance Notes to Government Entities – Complying with Section 41 of the National Conservation Law, 2013”* includes the statement that:

*“In order to comply with the [NCA] all government entities shall consult with the [NCC] if they are taking any action, granting any permission, taking any decision or giving or engaging in any undertaking which matches any of the following “trigger” conditions.*

*“Location Triggers” are:*

- i) Activities occurring on the coast, i.e., within 500 feet landward of the high water mark and activities occurring on land parcels with canal frontage*
- ii) Activities occurring seaward of the high water mark*
- iii) Activities in areas of primary habitat or critical habitat (as defined in a Conservation Plan)*
- iv) Activities in or adjacent to a protected area.”*

15. Section 41(3) provides that:

*“Every entity shall, in accordance with any guidance notes issued by the Council, consult with the Council and take into account any views of the Council before taking any action including the grant of any permit or licence and the making of any decision or the giving of any undertaking or approval that would or would be likely to have an adverse effect on the environment generally or on any natural resource.”*

16. The position of the CPA is that s.7 of the Development and Planning Act (2021 Revision) (“DPA”) requires that it *“...shall, to the greatest possible extent consistent with the performance of its duties under this Act, consult with departments and agencies of the Government having duties or having aims or objects related to those of the Authority or Board”*. The CPA notifies all relevant Government departments of applications for planning permission by posting them on its online planning system and by sending notice of the application directly to the relevant statutory authorities. That apparently enables entities such as the NCC to provide comment on applications and the CPA regards this as discharging its statutory duty under s.41(3) NCA.

17. *“Adverse effect”* is defined<sup>12</sup> and means: *“an effect that may result in the physical destruction or detrimental alteration of a protected area, a conservation area, an area of critical habitat or the environment generally”*. Adverse effect is defined to include: *“...(f) the discharge of pathogens,*

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<sup>12</sup> Section 2 NCA.



*dissolved or suspended minerals or solids, waste materials or other substances at levels that may be harmful to wildlife or the ecological or aesthetic value of the area”.*

18. Section 41(4) provides further that:

*“Every entity, except Cabinet, in accordance with any guidance notes issued by the Council and regulations made under this Law, shall apply for and obtain the approval of the Council before taking any action including the grant of any permit or licence and the making of any decision or the giving of any undertaking or approval that would or would be likely to have an adverse effect, whether directly or indirectly, on a protected area or on the critical habitat of a protected species.”*

19. The NCC is empowered by s.41(5):

*“In the case of a proposed action to which subsection (4) applies, the Council may, having regard to all the material considerations in this Law and regulations made under this Law -*

- (a) agree to the proposed action subject to such conditions as it considers reasonable, in which case the originating authority shall ensure that the proposed action is made subject to such conditions; or*
- (b) if the Council considers that the adverse impact of the proposed action cannot be satisfactorily mitigated by conditions, the Council shall so direct the originating authority and that authority shall refuse to agree to or refuse to proceed with the proposed action.”*

20. Section 41(6) provides that: *“any person aggrieved by a decision of the Council under this section may appeal against it to the Cabinet in accordance with section 39”.*

21. At various times during the course of the hearing, counsel reiterated the unique nature of the NCA. It appears that it is bespoke legislation drafted for the Cayman Islands Government with no direct equivalent. Mr Paget-Brown made reference in his written submissions to potential relevance of the Official Hansard Report in relation to the passage of the NCA through Parliament and the interpretation of its provisions. After the hearing, I reviewed the Official Hansard Report of the 2013/14 session of the Cayman Islands Legislative Assembly (now Parliament) which provides a transcript of the second reading of the National Conservation Bill, 2013 (“NCB”)<sup>13</sup>. The Second Reading of the NCB was moved by the Hon. G. Wayne Panton<sup>14</sup> who explained that the NCB had gone through various versions over the previous 10 years and had been reviewed by three successive Governments and two political parties as well as the local community. He explained some of the environmental background to the NCB and that the NCB sought to insert consideration for the environment in national decision making processes:

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<sup>13</sup> Page 389.

<sup>14</sup> The then Minister of Financial Services, Commerce and Environment, now the Premier.  
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*“...by requiring all government agencies and entities to consult with the National Conservation Council before making a decision, approving any plan or taking any action which may impact the environment. And, Madam Speaker, while I am on that let me just say quickly, there is a “Gentleman’s Agreement” in place today (and I will probably mention it further on) through which decisions which potentially have an impact on the environment such as planning decisions, for example, where any proposals that are received in respect of those before the decisions are made will be sent to the DoE [Department of Environment] for review. It is all currently a part of the process but there is no legal basis for that. There is no legal underpinning for that.”<sup>15</sup>*

22. He is recorded<sup>16</sup> as continuing to explain that s.41 of the NCB was intended to provide the legal underpinning to the obligation on all entities to consult on environmental issues before approving plans or projects and says:

*“Section 41(3) mandates that the current level of consultation (in relation to this Gentleman’s Agreement) continues, and is made consistent, because in practice today, Madam Speaker, it is not something that is done on a consistent basis. It is very often done but it seems it is not entirely consistent. It should be consistent, and this Bill will require that it be done completely on a consistent basis.*

*The advice which is given by the National Conservation Council in relation to proposals or actions which may cause harm to the environment must be taken into account by the entity which is making those decisions. But it is clear from the language that it is non-binding. They can take it into account, they can decide it is not relevant, or they can decide to what degree they want to consider it, but it is not binding.*

*In earlier drafts of the Bill, Madam Speaker, it was considered to be binding. This is one of the areas where over the last ten years we have significantly watered down (for lack of a better expression) the strength of the provisions so that at this point the advice that is being given to entities in respect of decisions which have a potential impact on the environment are effectively non-binding. The law will require that it takes that advice into account only; it does not say that that advice shall be paramount, shall prevail, shall hold the day, shall dictate the decision. It does not say that at all. It is essentially non-binding.*

*Now, the one caveat there, Madam Speaker (again, this is repeating the point that has been made a few times earlier), in section 41(4) the Council can be asked to give the same advice if that advice, or that proposal in respect of which it is giving advice, has an impact or a potential impact, negative impact on a protected area or a critical habitat area. And again, these are areas that with the assistance of significant public consultation, Cabinet has deemed it appropriate to protect them, to designate them as protected areas or critical habitat areas. It is only in that case where the action being proposed has a potential negative impact on either one of those two areas that the advice of the Council is required to be followed.*

*So, the Council can consider such an action or proposal, and if there are ways to mitigate the effects of those actions on a protected area or a critical habitat area, or, indeed, to eliminate those impacts, then the Council will undoubtedly provide advice to that effect. If after due consideration there is no possibility of mitigating the negative effects, or eliminating the negative effects, then the Council has the ability to say, No, that proposal can’t go forward as structured or as planned. It would have to change so that they could*

<sup>15</sup> Page 392.

<sup>16</sup> Page 396.



*reconsider it to see if there is any other way that they could mitigate the negative effects. But again, Madam Speaker, just stressing, this is where the Council is acting as the surrogate of Cabinet to protect the areas that Cabinet has said must remain protected after public consultation, public input. Protected areas will always, by virtue of this Bill, be Crown property. It is possible that critical habitat areas could be on private land, however.”*

23. Much of the argument in this case is about the obligations that arise under s.41(3) and (4) and the extent to which the CPA might or might not have had to make an application under s.41(4), which it did not do in this case. In my view, the intention of the legislature in relation to such an issue is clearly relevant when one considers the bespoke nature of the legislation and the time and effort put in to ensuring its precise wording and effect.

24. The CPA is established under the DPA. The CPA has power to delegate various statutory functions to the Director of Planning or their deputy<sup>17</sup>. Pursuant to s.15:

*“15. (1) Subject to this section and section 5(1), where application is made to the Authority for outline planning or permission to develop land or permission for a planned area development, the Authority may grant permission either unconditionally or subject to such conditions as it thinks fit, or may refuse permission.”*

#### **Background facts**

25. Two affidavits were filed in the proceedings. One was sworn on 30 September 2021 by Gina Ebanks-Petrie the Director of the DOE setting out the background to the planning applications made in relation to the Property. The other was sworn on 16 December 2021 by Haroon Pandohie the Director of Planning. The Applicant argued that Mr Pandohie’s affidavit should not be relied on as it sought to explain, after the event, the decision of the CPA<sup>18</sup>. It was agreed by the Respondent at the beginning of the hearing that the official record of its decision as set out in the minutes of the relevant meeting constituted the best evidence of the grounds upon which its decision was taken and that no reference would be made to the relevant paragraphs of Mr Pandohie’s affidavit.

26. On 29 June 2009 a cabana building and a seawall were granted planning approval on the Property and were subsequently constructed.

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<sup>17</sup> Section 5 DPA.

<sup>18</sup> The Court of Appeal of England and Wales has held that in the context of collective decision-making bodies, a public body has held that in the context of a collective decision-making bodies, the public body is not entitled to rely on post- hoc evidence which is inconsistent with the official record, save in exceptional circumstances for evidence which is inconsistent with the official record, save in exceptional circumstances *R (Young) v Oxford City Council* [2003] JPL 232 and *R (Lanner Parish Council) v Cornwall Council* [2013] EWCA Civ 1290.  
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27. On 17 November 2020, the Interested Party, as the owner of the Property, met with the DOE to seek guidance on remedial work to the seawall. In a subsequent memorandum dated 16 April 2021 the DOE stated:

*“The applicant met with the [DOE] on 17 November 2020 to discuss remediation works to the seawall. It was agreed by all that the existing structure is failing and has lost structural integrity... The Department reiterated its position that the seawall has been built too close to the sea on the active beach and that the Department does not support development position so close to the sea. The Department advised that in order to attempt to reduce the negative impacts that the seawall is having, the applicant could consider using design techniques such as a curved or stepped seawall to help dissipate wave energy and that the square structure of the seawall is a particular problem.”*

28. On 3 December 2020, the Interested Party made an application to the CPA for the replacement of the cabana with a residential building and remedial works to the existing seawall, ignoring the DOE’s suggestion to include a curved seawall.

29. On 16 April 2021 the Director sent the memorandum mentioned above to the CPA. The DOE raised concerns about coastal setbacks, the integrity of the existing structure (in relation to which it concluded that it would be negligent to grant approval for a dwelling on the property with no comfort that the proposed design will not also result in the same structure failure as the existing one), the vulnerability of the proposed development, the impact of the seawall on the active beach and construction impacts.

30. In relation to construction impacts it stated:

*“Due to the proximity of the structures of the water, the proposed engineering works and construction of the proposed development will have adverse impacts on the Marine Protected Area. The Engineering Report [obtained by the Interested Party] states that pumping and shoring will be required, and there is no location provided for dewatering of sediment-laden water. The site is too small to facilitate this on site. Any pumping into the Marine Park will result in sedimentation and turbidity impacts. In addition, the rate of pumping is likely to be very high given the depth into the groundwater required for the additional foundation, the porosity of the sand and the proximity to the sea.*

*While there is currently a beach at the site, there is no way of ensuring the beach will remain during construction. Aerial photographs of the site over a period in excess of 50 years indicates that it is highly probable that the beach, and therefore the setback, will shrink between now and the construction period.*

*It is not possible to construct such a large development on such a small site without deleterious impacts on the Marine Park, especially given the negative impacts experience when the sea wall was constructed. The information provided does not satisfy the Department that the proposed development would not result in the discharge of dissolved or suspended minerals or solids at levels that may be harmful to the ecological or aesthetic value of the area.*



*Sedimentation is one of the biggest potential sources of reef degradation by reducing the amount of light available for photosynthesis and by increasing sediment load on corals."*

31. The Director concluded by directing the CPA pursuant to s.41(5)(b) of the NCA to refuse that planning application.
32. The Interested Party's application of 3 December 2020 was refused by the Planning Authority on 28 April 2021. In its explanatory letter of 6 May 2021 the CPA advised the Interested Party that the planning application had been refused for failure to comply with high water and side setbacks.
33. On 28 May 2021 the Interested Party made the Application which was for planning permission for replacement of the existing building with a cabana and to construct a new curved seawall (pursuant to the DOE's 17 November 2020 advice) on the landward side of the existing seawall and then remove the existing seawall. The Property's seawall, in danger of failing, required urgent remedial work.
34. By letter dated 24 June 2021 (sent to the Department of Planning on 1 July 2021 along with the Director's further contemporaneous memorandum), the Secretary of the NCC notified the CPA of a purported delegation of the Council's authority to direct the CPA to refuse the planning permission. The letter provided:
  - "1) The submission for planning approval for a cabana and remediation work to a seawall on parcel 5B 162, as presented by the Department of Environment, was considered by the National Conservation Council at its preparatory workgroup session of 23 June 2021.*
  - 2) Council noted a variety of factors including, but not limited to,*
    - a. The architect's submission to the Department of Planning;*
    - b. The engineers report regarding the proposed seawall and cabana at 33 Boggy Sand Rd, block 5b parcel 162;*
    - c. The existing problems at the site, stemming from works previously receiving planning approval, inherited by the current owners;*
    - d. The potential impacts of redevelopment methods and design on the nearshore environment;*
    - e. The eventual collapse of the existing structure and the impact of that on the nearshore environment;*
    - f. The adjacent Marine Reserve (Protected Area);*
    - g. The likely direct and indirect adverse effects of the proposed planning approval on the adjoining protected area; and*
    - h. That the adverse impact of the proposed planning approval cannot be satisfactorily mitigated by conditions.*
  - 3) On the basis of the information currently available regarding the submission for planning approval for a cabana and remediation work to a seawall on parcel 5B 162 the National Conservation Council authorised the Department of Environment, acting*

*under its previously delegated authority, to direct the Central Planning Authority to refuse the application.*

- 4) *This decision will need to be ratified at the next suitable General Meeting.*
- 5) *The Council takes this opportunity to remind the originating entities (The Department of Planning and the Central Planning Authority) that a person aggrieved by a decision of the Council may appeal that decision under section 39 of the Act and the originating entities should make such person is aware of this by the usual and sufficient means.”*

35. The Director’s memorandum repeated the Director’s concerns about the adequacy of the replacement sea wall that would be built as part of the proposal. In addition, she gave her opinion that the development would be likely to have an adverse impact on the Seven Mile Beach Marine Reserve, through the discharge of dissolved or suspended minerals or solids, which may be harmful to corals and sponges:

*“The Department is very concerned about the construction impacts on the Marine Protected Area. Given the erosion that has occurred ... it is unclear how these works can be conducted without causing significant levels of sedimentation and turbidity in the marine environment, as the sea will undoubtedly inundate the construction site.*

...

*It does not seem possible to construct this development on such a small site without deleterious impacts on the Marine Reserve, especially given the negative impacts experienced when the seawall was originally constructed....*

*The information provided does not satisfy the Department that the proposed development would not result in the discharge of dissolved or suspended minerals or solids at levels that may be harmful to the ecological or aesthetic value of the area.*

*Sedimentation is one of the biggest potential sources of reef degradation by reducing the amount of light available for photosynthesis and by increasing sediment load on corals. Corals are all Schedule 1 Part 1 Protected Species, which are protected at all times, and the site is within the Marine Reserve, and contains an area of coral reef which has a very high economic value for Cayman’s tourism both directly (diving, snorkelling) and indirectly (ecosystem services). Excessive sedimentation can affect the complex food web on the reef by killing not only corals, but also sponges or other organisms which serve as food for important fish species.*

*Corals are under continuous stress from external sources (e.g. climate change, bleaching events, Stony Coral Tissue Disease) and adding further local stress could be the tipping point passed which our corals cannot survive. Given that so many external stressors on corals are beyond the control of the Cayman Islands Government and statutory bodies (including the Central Planning Authority and the National Conservation Council), it is even more important that local decisions within Cayman’s control take a more deliberate consideration of corals and the effect on the marine environment. There is very little information provided by the applicant on proposed construction methodology, and none which indicates that the effects on the Marine Reserve could be mitigated.”*

36. The CPA was thereby aware that the Director was of the view that the grant of planning permission would be likely to have an adverse effect on a protected area.



37. The CPA met on 1 September 2021 to consider various applications for planning permission including the Application. It became clear during this hearing that the CPA comprises its members appointed under the DPA. It does not have its own staff. Mr Jackson explained that when responses come to the Department of Planning (effectively the CPA's secretariat) after consultation under s.7 DPA (s.41(3) NCA) they are not considered by anyone at that point. They are included on the agenda for the CPA meeting at which a particular planning application is being considered. That will be the first occasion on which relevant responses will be drawn to the attention of the CPA. It is only at that point that any responses from e.g. the DOE will be considered by the members of the CPA. It is at that point that consideration is given as to the application of s.41(3) and possibly (4). The record of the CPA's deliberation in relation to the Application is as follows:

*"The applicant's engineer made representation that the current seawall had become compromised and was presenting the applicant with several issues and was in desperate need of repair or replacement. The Authority concluded the discussion by noting that the current state of the property was an area of concern, however, the deliberation of the Authority had to be confined to the application currently before it. The Authority accepted that it had to walk a fine line given that the application before it, consisting of a cabana and seawall, would result in a redevelopment of an existing site and not a vacant green field site.*

*The CPA also noted that as far as massing/scale/height are concerned, the proposed design for the cabana was a huge improvement to the existing roofed structure.*

*The Authority noted that planning permission was given in the past for an L shaped seawall, which as noted by the applicant is exhibiting signs of significant structural deterioration and was in danger of structural failure. It was accepted that repair works could be undertaken on the existing wall without the necessity to obtain planning permission.*

*The current seawall, as noted by the DoE is contributing to the erosion of the beach in this area. That said, it is noted that the current wall works in concert with other seawalls in the area, inclusive of the CIG built seawall aimed at protecting the Boggy Sands Rd. and associated properties.*

*The Authority notes that the DoE had, as a part of the discussions with the applicant, endorsed the use of a curved seawall, and had noted that use of the recommended curved design would mitigate the impacts of the wall and the adjacent properties.*

*The DOE had endorsed the utilisation of a curved wall design as a means to redirect or dissipate wave energy, once designed by a coastal engineer. The Authority was satisfied that the proposed seawall had been designed by a qualified civil engineer with sufficient coastal work experience, and therefore accepted the design as presented."*

38. The Application was approved and the CPA produced a statement of reasons as follows:

***"Reasons for the decision:***

- 1. Except for the high-water mark setback, which is addressed below, the application complies with the Development and Planning Regulations (2021 Revision).*



2. *The proposed development does not comply with the minimum required setback from the high-water mark per Regulation 8(10)(b) of the Development and Planning Regulations (2021 Revision). Pursuant to Regulation 8(11), the Authority may allow a lesser setback having regard to:*
  - a. *the elevation of the property and its environs;*
  - b. *the geology of the property;*
  - c. *the storm/beach ridge;*
  - d. *the existence of a protective reef adjacent to the proposed development;*
  - e. *the location of adjacent development; and*
  - f. *any other material consideration which the Authority considers will affect the proposal.*

*In this instance, the Authority determined the following-*

- *The Authority accepted the advice rendered initially by the Department of Environment that the use of a curved or stepped seawall would serve to redirect or dissipate wave energy, thereby reducing the negative effects the current seawall is causing.*
- *The Authority was satisfied that it was not in possession of a lawful directive issued under Section 41(5) of the National Conservation Act, by the National Conservation Council directing the Authority to refuse planning permission without undertaking a full inquiry and consideration of the application under its statutory mandate to effectively direct development so as safeguard the economic, cultural, social, and general welfare of the people, subject thereto the environment.*
- *The elevation of the property and its environs is high enough to assist in minimizing storm surge thus allowing the proposed development to be closer to the high-water mark.*
- *The construction of a seawall serves to attenuate the impacts of wave action.*
- *There are existing developments on adjacent properties with similar setbacks from the high-water mark. Therefore, the setback of the proposed development is consistent with the established development character of the area, and it will not detract from the ability of adjacent landowners from enjoying the amenity of their lands.*
- *The Authority accepted the view that the proposed design of the seawall will serve to mitigate impacts upon abutting properties. Specifically, the convex design of the wall and the curve at the top of the wall will reduce the impacts of wave action. The Authority noted that the proposed setbacks are an improvement over the previous planning permission granted in 2009.*
- *The application was subject to Section 15(4) notices to adjacent landowners and no objections were received. The Authority was satisfied that the proposed structures would not be materially detrimental to persons residing in the vicinity, to the adjacent properties, or to the neighbouring public welfare.*
- *The Authority determined that the existing seawall was becoming detrimental to the property, surrounding properties, and the abutting Marine Protected Area given the deteriorating state of the wall and the serious structural integrity issues relating to the failure of the foundations as noted by the reviewing engineer. The Authority concluded that permitting the current seawall to remain in situ would result in the least desirable outcome for the surrounding environs with the inevitable further deterioration and eventual failure of the existing wall.*
- *The Authority fully considered the advice submitted by the DoE and determined that in its conclusion the DoE placed an undue reliance on the concept of a managed retreat and removal of all structures from the site, as this was not a*



*consideration before the Authority. The Authority notes the inconsistency in the advice provided by the DoE which advocated for the removal of all structures from the property, juxtaposed against the recommendation calling for the installation of a properly designed wall, on the subject site, for the protection of the adjoining house with a tie-in to the sheet-piled CIG installed seawall on Mary Molly Hydes Road. The Authority was unable to rationalise the inconsistency in the advice rendered by the DoE in this regard, and therefore was unable to adopt the advocated course of action.”*

39. As part of the CPA’s analysis as set out in the minutes of its meeting on 1 September 2021, it is noted on page 30 that:

*“The Authority asked Mr Alberga to comment on the fact that DoE director was directing the CPA to refuse the application. Mr Alberga stated that his opinion was the CPA had discretion to approve the development as submitted and were not bound by the comments of the DOE. The Authority should take into account the urgency of the situation and that the existing wall cannot be repaired and will fail.”*

40. It seems therefore, that the CPA approached the planning application on the following basis:

- 40.1 it was cognizant of the concerns expressed by the DOE/NCC as to the likely adverse effect that the proposed works would have on the environment and that in its letter of 24 June 2021 it had purported to authorize the DOE to direct that the CPA refuse planning permission;
- 40.2 it had concluded that the Director had no legal authority to direct it pursuant to s.41(5) NCA;
- 40.3 it formed the view (likely based on the advice from Mr Alberga who appeared at this hearing with Mr Lowe on behalf of the Interested Party) that, in any event, it had a discretion and was not bound by the comments from the Director;
- 40.4 it was of the view that the sea wall was going to fail unless replaced or repaired leading to potentially more serious consequences for the environment; and,
- 40.5 on that basis, it assumed the responsibility for imposing such conditions on the grant of planning permission that it felt met the concerns of DOE/NCC as to the adverse effect on the environment and that, as a result, there would not likely be an adverse impact on the environment by virtue of the grant of planning permission and therefore no need to make an application under s.41(4).

### **The application for judicial review**

41. On 28 September 2021, in accordance with the pre-action protocol for judicial review, counsel for the NCC sent a letter before action to the CPA and to the Interested Party. The letter confirms that the decision under challenge was the decision by the CPA to grant planning permission to the



Interested Party, despite the direction from the Director because the CPA took the view that the direction constituted a “*directive*” within the meaning of s.3(13) of the NCA and, as such, the delegation of that function was invalid.

42. An application for leave to claim judicial review was issued on 20 September 2021. At paragraph 10, the application describes the grounds for judicial review as being “*narrow and hard-edged*”:
- 42.1 first, the NCC claimed that a s.41(5) direction is not a “*directive*” within the meaning of the NCA. Accordingly, the s.41(5) direction to the Respondent to refuse planning permission was valid and the grant of planning permission was in breach of the Respondent’s duty to give effect to the s.41(5) decision; and,
- 42.2 second, even if the s.41(5) direction was invalid, the grant of the Permission was unlawful because the Respondent had failed to obtain the Applicant’s consent as required by s.41(4).

The Applicant also referred in paragraph 49 of its application for leave to the contention that the Respondent did not reject the Director’s conclusions (or, at least, failed to give reasons which could reasonably justify the rejection of the Director’s conclusion).

43. The relief sought by the Applicant is an order quashing the decision under challenge and a declaration that a direction to an originating entity under s.41(5)(b) of the NCA is not a “*directive*”, meaning it can be delegated by the Applicants to the Director of the Department of Environment under s.3(13) of the NCA.
44. On 14 October 2021 leave was granted on the papers by Madam Justice Ramsay-Hale for the Applicant to apply for judicial review and staying the grant of planning permission until the final hearing.
45. The written submissions of the parties prepared for this hearing deal with the respective positions of the parties. The directions given leading up to this hearing provided for the Respondent’s submissions to be filed and served first and then those of the Applicant, so I will deal with them in that order.
- 45.1 The first issue identified by the Respondent is that s.3(13) of the NCA does not permit the NCC to delegate giving orders or directions so the Director could not assume that she has delegated authority to direct the CPA to refuse planning permission. The Respondent says that all that can be delegated to the Director is the issuance of guidance notes. As outlined above the NCC rejects this contention.

- 45.2 The second issue identified by the Respondent is whether the CPA has to apply to the NCC for consent before granting planning permission if it has determined that the grant of planning permission would not have an adverse effect on the environment?
- 45.3 The Respondent argued that s.41(4) of the NCA required the CPA to have specific regard to whether there would or could be an adverse impact on a protected area and critical habitat of a protected species, before the CPA could refer the matter to the NCC. In this case it is said that the CPA had nothing before it upon which it could rationally and lawfully have made such a finding.
- 45.4 It ended up being common ground that the NCC's power under s.41(5) cannot arise unless an application is made under s.41(4). This means that, in this case, the steps taken by the Director to "*direct*" the CPA were of no effect regardless of whether the NCC had power to delegate them to the Director and, if it did, whether it did so effectively.
- 45.5 For the purposes of these proceedings only, it was accepted by the NCC that if the CPA lawfully determines that a development will not have an adverse effect on a protected area or critical habitat, then it is not required to obtain the NCC's approval under s.41(4) of the NCA and the NCC's functions under s.41(5) do not arise. In turn, this then lead to argument about the question of the reasonableness of the CPA's decision in that regard. The Respondent and Interested Party objected to the latter issue being raised as they submitted that it fell outside the ambit of the application for judicial review as drafted by the Applicant. They argued that the application could only proceed on the basis of the grounds set out in the statement of facts and grounds in support of the application<sup>19</sup>. It was argued that the statement of facts and grounds did not raise or rely on the question of whether the decision of the CPA that s.41(4) did not apply was reasonable.
- 45.6 The third issue is whether, as a matter of law, the discretion granted to the NCC under s.41(5) of the NCA can be delegated to the Director of the DOE. This has ended up not being an issue that requires determination for the purposes of the current judicial review but the parties have asked me to consider expressing my view on the point as it will assist them in the future.

### **Is the Guidance lawful?**

46. Notwithstanding, the somewhat fluid position of the parties in relation to some of the issues that have been raised, it seems to me that the starting point in this case is to consider the status of the Guidance.

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<sup>19</sup> GCR O.53, r.6(1).



47. As part of its argument in relation to s.41(4), the Respondent has challenged the legitimacy of the Guidance.

47.1 In that regard, the Respondent refers to s.3(12)(i) of the NCA which provides:

*“The Council., subject to any directions of the Cabinet, may make orders and guidance notes and issue directives for the purpose of giving effect to the provisions of this Law and such orders, guidance notes and directives may include- ... (i) procedures for consultation by entities pursuant to section 41(3).”*

47.2 Pursuant to s.3(12)(i) of the NCA, the NCC issued the Guidance which states amongst other things:

*“To comply with the Law all government entities shall consult with the Council if they are taking any action, granting any permission, taking any decision or giving or engaging in any undertaking which matches the following 'trigger' conditions.*

*A) Location Triggers are (as shown on the Screening Map):*

- i) Activities occurring on the coast, i.e., within 500 feet landward of the high watermark and activities occurring on land parcels with canal frontage*
- ii) Activities occurring seaward of the high water mark*
- iii) Activities in areas of primary habitat or critical habitat (as defined in a Conservation Plan)*
- iv) Activities in or adjacent to a protected area*

*B) Activity Triggers include:*

- i) Subdivision, clearing, filling, or excavation on land of one acre or more*
- ii) Land reclamation projects*
- iii) Large scale residential developments and special purpose developments, including projects of national importance, mixed use and Planned Area Developments*
- iv) Agriculture on land area greater than one acre, and installation of aquaculture and the reclamation of land from the sea for such purpose of any scale.*
- v) Telecommunication, broadcast or radar installations*
- vi) Transportation infrastructure, including planning or construction of new roads, including construction of road extensions*
- vii) Industrial Processing, Manufacturing, Rendering, Production, Treatment, Storage, or Similar Facilities*
- viii) Storm water drainage and management schemes*
- ix) Petroleum fossil fuel, biofuel and other fuel or chemical production, processing, holding, transfer or transport facilities*
- x) Waste Management Activities, Solid & Liquid, including new facilities, expansion, enhancement or change of system at existing facilities*
- xi) Excavation and extractive operations, including - marine dredging; quarries; extraction of minerals; deep drillings (including geothermal drilling); extraction of petroleum, natural gas or ores;*

*an installation for the disposal of controlled waste(s) from mines and quarries.*

- xii) *Energy Generating, Transfer or Transmission Facilities*
- xiii) *Ground water or sea water abstraction*
- xiv) *Airports and Airstrips*
- xv) *Ports, harbours, yacht marina and inland waterways which permit the passage of vessels*
- xvi) *Water Generating Facilities, including Desalinization Plants*
- xvii) *Discharge, Emission or Disposal of Effluents or other materials*
- xviii) *Decommissioning or Decontamination of industrial installations*
- xix) *Physical, Chemical or Biological Pest Control Activities, including application of pesticides, including larvacides and adulticides, herbicides, insecticides, rodenticides, etc.*
- xx) *Setting fires for the clearance of land*
- xxi) *Burial at Sea or other than in a designated cemetery*
- xxii) *Marine Moorings, etc.*
- xxiii) *Anchorage Areas*
- xxiv) *Control of Nuisance Animals or Plants*
- xxv) *Licensing of Trade Or Business Activities Which Utilize Local Natural Resources For Their Core Activity*
- xxvi) *Discharge or Modification of Permissions and Conditions Attached to Permissions*

- C) *Strategic Triggers include the creation of*
- (i) *National or Sectoral Policies or Projects including, but not limited to*
    - a) *Tourism Plans*
    - b) *Economic Plans*
    - c) *Energy Policies, including Power Needs/Purchase Planning*
    - d) *Development Plans*
    - e) *Transport Plans*
    - f) *Infrastructure Planning*
    - g) *Socio-Economic Planning*
    - h) *Port Plans, Air or Sea*
    - i) *Emergency Response Planning, Including State of Emergency Derogations*
    - j) *Industrial Activity Plans*
    - k) *Emergency or Disaster Response Management Plans*
    - l) *Acquisition/Sale/Disposal/Lease/Loan of Crown Land.*

47.3 The Respondent says that the provision of “*trigger conditions*” goes beyond the meaning and scope of the definition of “*adverse effect*” provided in s.2 of the NCA and is an unlawful expansion of the NCA. The Respondent says that this contradicts s.41(3) and 41(4) of the NCA, which provide that the CPA shall determine for itself whether a grant of permission would or would be likely to have an adverse effect. By way of example, the Respondent referred to the requirement that the CPA seek approval from the NCC, for any application relating to property within 500ft landward of the high-water mark, a requirement that includes the majority of the land in the Islands and one which the



Respondent implies is too wide. The Respondent says that the lawful function of issuing “guidance notes” is that they be explanatory and instructive, e.g., to explain, procedures for consultation. Insofar as the NCC's guidance notes purport to stray into to field of giving “directives” or “orders” or otherwise expand the NCC's powers beyond the remit of the NCA, the Respondent says that they are *ultra vires* the law and consequently are not binding.

48. The NCC’s position is that the Guidance was issued by the NCC under s.41(2) of the NCA and the Guidance has never been challenged under s.44 which provides that:

*“Any person may, without prejudice to any other legal redress he might have, make an application to the court for the judicial review of any act or omission under this Law of any entity, public officer, the Council or the Director that is alleged to be in violation of any provision of this Law.”*

On that basis, the NCC says that unless and until challenged by judicial review and quashed, the rule of law requires that the Guidance is followed<sup>20</sup>.

49. More substantively, s.3(12) of the NCA provides that:

*“The Council, subject to any directions of the Cabinet, may make orders and guidance notes and issue directives for the purpose of giving effect to the provisions of this Law and such orders, guidance notes and directives may include...”* (emphasis added).

The power to issue guidance notes (which is not a defined term) is not specifically limited to the matters listed in s.3(12). As has been indicated above, s.3(12)(i) refers specifically to guidance in relation to procedures for consultation by entities pursuant to s.41(3). The definition of “adverse impact” refers to effects that “may result in the physical or detrimental alteration of a protected area, a conservation area, an area of critical habitat or the environment generally and includes...” (emphasis added). Again, the concept of adverse impact is not limited by reference to the factors set out in s.2 and the threshold for it to be a factor is no higher than “may”.

50. In s.41 it is provided that:

*“(2) For the purposes of subsection (1) the Council shall formulate and issue guidance notes to entities on their duties under this Law, and any action taken in full accordance with such guidance shall be deemed to be in compliance with this Law.”*

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<sup>20</sup> *R (Majera) v Secretary of State for the Home Department* [2022] AC 461, para 29 which states: “If an unlawful administrative act or decision is not challenged before a court of competent jurisdiction, or if permission to bring an application for judicial review is refused, the act or decision will remain in effect.”  
*220823 National Conservation Council v The Central Planning Authority et al - Judgment Final*



The relevant sections from the Official Hansard Report dealing with the NCB record that the wording in s.41 was changed so that instead of referring to “*directives giving*” it referred to “*guidance notes*” with the intention that they would be advisory in nature.<sup>21</sup>

51. Looking at the provisions of the NCA itself, I see nothing that places restrictions on the NCC to issue the Guidance in its current form or that would render the Guidance unlawful or suggests that the NCC could be said to have been acting ultra vires when issuing it. Even if there was good argument to that effect, the Applicant has rightly pointed out that, unless and until challenged, the Guidance stands to be followed as a matter of law. It is expressly provided that the Guidance can cover procedures for consultation under s.41(3) and that is what they do. In my view, the Guidance is lawful and, as a matter of statute, must be followed by entities.
52. On the basis therefore that the Guidance is valid and lawful, this is a useful point to look at it in a little more detail as I think it is relevant to the further debate over s.41(4). It also strikes me as important to bear in mind that, as the Guidance reminds us and as mentioned at the outset, the NCA applies to “*entities*” defined as meaning any body of the government and includes the Cabinet, any ministry, portfolio, statutory authority, government, company or any other body which exercises a public function. It also includes all government departments, agencies, units, administrations, etc., as arms of their relevant Ministry. So when considering the various submissions on the part of the CPA and the Interested Party I have to bear in mind that the relevant provisions of the NCA apply far more widely than just in the context of the grant of planning permission.
53. As a matter of course, entities will have to consider the environment in the context of taking decisions or actions. If a decision or action involves the environment then the first step will be for the entity to consider the Guidance, as it is required to do. If the decision or action involves one or more of the triggers then the entity must consult the NCC pursuant to s.41(3).
54. After the section dealing with triggers, the Guidance goes on to provide as follows:
- “Assessment of Consultations by the Council*  
*In assessing a request for consultation as a result of triggering activities, locations or strategic policies or projects (A – C above) the Council will take into account the characteristics of the proposed action, its location and the potential for adverse impact on the environment, particularly the cumulative effect of the characteristics. Examples of relevant characteristics are: -*
- Characteristics of Action*
1. *The characteristics of an action must be considered having regard, in particular,*  
*to –*

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<sup>21</sup> Page 408.



- a. *Size of the action;*
- b. *The cumulation with other actions;*
- c. *The use of natural resources;*
- d. *The production of waste;*
- e. *Pollution and nuisances;*
- f. *The risk of accidents, having regard in particular to substances or technologies used.*

*Location of Action*

2. *The environmental sensitivity of geographical areas likely to be affected by an action must be considered, having regard in particular, to –*
  - a. *The existing land use;*
  - b. *The relative abundance, quality and regenerative capacity of natural resources in the area;*
  - c. *The absorption capacity of the natural environment, paying particular attention to the following areas*
    - i. *Wetlands;*
    - ii. *Dry forest;*
    - iii. *Xerophytic shrubland*
    - iv. *Protected areas;*
    - v. *Coastal zones;*
    - vi. *Marine Parks or Reserves;*
    - vii. *Densely populated areas;*
    - viii. *Landscapes of historical, cultural or archaeological significance.*

*Characteristics of the potential impact*

3. *The potential significant effects of actions must be considered in relation to criteria set out under paragraphs 1 and 2 above, and having regard in particular to–*
  - a. *The extent of the impact (geographical area and size of the affected population);*
  - b. *The magnitude and complexity of the impact;*
  - c. *The probability of the impact;*
  - d. *The duration, frequency and reversibility of the impact.*

*A request for consultation shall be accompanied by:*

- 1) *A plan sufficient to identify the location of activity;*
- 2) *A detailed description of the nature and purpose of the activity, including any plans in the case of developments or similar, and the activity's possible effects on the environment; and*
- 3) *Any other information that the entity making the request may wish to provide.*

*The DoE, on behalf of the Council, if they consider that they have not been provided with enough information to provide an informed consultation response, shall notify in writing the entity making the request of the points on which they require additional information.*

*Council consultation may be begun by emailing ConservationCouncil@gov.ky, or by memo or mail care of the Department of Environment. Questions regarding the Law in general or consulting with the Council in particular may be likewise directed. These Guidance Notes will be reviewed periodically by the Council as appropriate.*

*The Council welcomes pre-project/application consultation with individuals as well as entities considering any of the above.”*



I do not believe that there is any disagreement that the Director and the DOE are specialists. Indeed, one only has to look at the functions of the Director as set out in s.6 of the NCA and the substantive involvement of the Director and members of the DOE as members of the NCC to appreciate that fact. The reason for quoting from the Guidance at such length is because it seems to me that it clearly sets out the non-exhaustive criteria that the NCC, in conjunction with the Director and DOE, should apply and follow when conducting assessment of consultations. It is the NCC therefore that conducts that exercise as it is empowered and appropriately skilled to do. The earlier extracts from Hansard also make it clear, in my view, that the legislature intended that it would be the NCC conducting assessments of ways to mitigate the effects of actions on a protected area or a critical habitat area, or, indeed, to eliminate those impacts. In doing so, the NCC acts as the surrogate of Cabinet.

#### **Section 41(4)**

55. The position of the Applicant is that, for the purposes of this claim, it accepts that if the CPA lawfully determines that a development will not have an adverse effect on a protected area or critical habitat, then it is not required to obtain the NCC's approval under s.41(4) of the NCA and the NCC's functions under s.41(5) do not arise.
56. The NCC reserves the right to argue in the future that either (a) the NCC is the primary decision-maker in relation to whether development "*would be likely to have an adverse effect, whether directly or indirectly, on a protected area or on the critical habitat of a protected species*" for the purposes of s.41(4) (pursuant to a consultation under s.41(3), through which it will be provided with details of the proposal) or (b) that this is a precedent fact which, in the event of dispute, must be determined objectively by the Court.
57. The Interested Party takes the view that s.41(4) has two elements. The first is the requirement of adverse effect. The second is the mandatory obligation to make an application to the NCC once that condition is satisfied.
- 57.1 The Interested Party approaches the question of how s.41(4) works by comparing the relative merits of having the determination made by either the CPA or the NCC. Its position is that s.41 clearly points to a conclusion that it must be the licensing or permitting authority and not the NCC that has to decide whether or not the trigger condition is satisfied. In fact, it says, s.41(4) NCA suggests that the NCC has no active role in the application process.
- 57.2 It is the permitting or licensing authority which applies to the NCC for approval under s.41(4) NCA. It imposes an obligation on, for example, the CPA. It does not confer any



power on the NCC to decide when or whether that application has to be made. Because the licensing or permitting is required to make an application, it is logical for that entity to determine whether or not the threshold condition is satisfied, otherwise the process of applying is merely administrative.

- 57.3 Section 41(4) NCA applies as between the NCC and any other “entity” that grants permission (i.e. another statutory body or a part of the Government). The duty to apply to the NCC is imposed on an administrative body as public law duty owed to the NCC.
- 57.4 It is inevitable therefore the Interested Party argues that s.41 must operate in a more complex statutory context applicable to the relevant licensing regime (here the DPA).
- 57.5 The legislature has necessarily already entrusted the other statutory body (here the CPA) with the administration of a licensing or permitting system (here the grant/refusal of planning permission). It is entirely logical that it would trust that same body to make the threshold decision under Section 41(4) NCA.
- 57.6 The NCC is given no power in the NCA to intervene or insist on an application to itself under s.41(4) so that it can exercise its express powers under Section 41(5) NCA. This is hardly surprising according to the Interested Party as public bodies should be able to cooperate and come to some consensus. If the legislature had intended for the NCC to be able to intervene, it would surely have done so in a much less roundabout manner than requiring an application to be made to it for approval. For example, the NCC could have been given power to call in the interested party’s application for permission or been allowed to reject it directly. The absence of any express power of intervention is a powerful indication that there is none.
- 57.7 The entity that administers a licensing or permitting system such as the CPA is inevitably in a far better position than any other government body to decide whether that particular application for planning permission triggers the condition in s.41(4) to require approval by the NCC.
- 57.8 The licensing or permitting authority should be in possession of all the material background well before any application for the NCC’s approval had to be made under s.41(4). The CPA, for example, is likely to have been provided with substantial paperwork as part of its own permitting/licensing process at a much earlier stage.
- 57.9 The licensing or permitting authority can be expected necessarily to be sufficiently familiar with the environmental issues to know whether or not it has to apply to the NCC under s.41(4) (without prompting by the NCC). This because it otherwise cannot perform its own general statutory obligation with respect conservation issues.



- 57.10 Moreover, even if it is not true of others, the CPA certainly will as a matter of course (and express obligation) consult with the DOE, as indeed it did here. S. 7 DPA provides that the CPA must consult with other government bodies “to the greatest extent possible” (which it did).
- 57.11 In contrast, the Interested Party says, the NCC is not in nearly as good a position as the CPA to determine, before an application for approval is made to it under s.41(4), whether or not a planning permission would have a relevant adverse effect so as to trigger the obligation.
- 57.12 The duty under s.41(4) is to be performed *before* the permit is granted. The fact of an application for planning permission being made to another entity may be unknown to the DOE or NCC before the relevant statutory body has made an application to it under Section 41(4). In any given case there may have been no or minimal publicity or such publicity as existed may not have been noticed by the DOE or NCC.
- 57.13 Even when the fact of the application for planning permission is known to the DOE/NCC, they may not know enough about that application so as to be able to determine whether the application for permission (e.g. to the CPA) poses a relevant adverse risk. In contrast, the relevant statutory body is much more likely to be in possession of that information.
- 57.14 The Interested Party argues that if statutory bodies function as they are supposed to function (as it says the CPA did in fact in this case), s.41(4) works perfectly well. If the NCC/DOE was concerned it could have urged the CPA to make an application (which it did not) or could have said that the permit would have an adverse effect on an endangered species (which it did not) or could have asked Cabinet to intercede. If it does not like the way in which the CPA decided whether there was the relevant adverse effect, it should not be allowed to challenge the CPA unless it can show that the CPA acted perversely. That points to a conventional *ex post facto Wednesbury* challenge and not a right for the NCC to decide for itself whether the threshold in s.41(4) is satisfied.
58. The Interested Party goes on to argue that the adverse effect condition in s.41(4) itself gives rise to a number of issues of construction:
- 58.1 There is the question of what kind of adverse effect needs to be shown. The issue of construction is largely settled by the statutory definition in s.2 where “*adverse effect*” is defined essentially by reference to various forms of environmental risk.
- 58.2 There is an immediate need to know how this adverse effect is to be established and by whom. The Interested Party says that the choices as to who should make the determination

of adverse effect, boil down to (i) an objective test resolved by a tribunal (ii) the CPA or (iii) the NCC/DOE.

- 58.3 The Interested Party says that it is now conceded that it is the CPA who makes the decision. Otherwise, the NCC could not criticise the CPA for a lack of reasons: it is only because it now accepts the CPA to be the decision-maker that it has any judicial review grounds.
- 58.4 The NCC now agrees it is a matter for the CPA to make the administrative decision whether the trigger condition in Section 41(4) is satisfied which can be reviewed primarily on *Wednesbury* grounds.
- 58.5 The corollary is that if the NCC succeeds in these proceedings on “*failure to give reasons*” the permission would be quashed for the CPA to give further reasons which is likely (given what was said by the CPA) to remain the same decision with more explanation. That renders the current judicial review process fruitless.
- 58.6 The Interested Party argues that s.41(4) also requires a causal connection between the grant of a permit and the risk of adverse effect. That test is expressed by the words “*would or would be likely to have*” adverse effect. This is the same causal test as in s.41(3).
- 58.7 The grant of a permit must therefore be linked to a *specific* risk of adverse effect.
- 58.8 The words “*would*” or “*would be likely*” suggest that there must be a fairly strong degree of probability of a risk of adverse effect. This is important says the Interested Party. First, the test of causation must have been intended to create a distinction between the role of different agencies in causing risk. The Interested Party gives examples:
- 58.8.1 It is obvious that the grant of planning permission which permits development in the mangroves is itself causing an adverse effect. Planning permission would specifically allow development where it should not take place;
- 58.8.2 It is far less obvious that the grant of planning permission allows the developer to deploy “*dirty*” construction methods which would have an adverse effect on the environment. The application for planning permission ordinarily would not deal with this.
- Secondly, once causation is an issue it also becomes necessary to tie the grant of permit to an identifiable or *specific* risk of adverse effect. Otherwise, how could causation work?
- 58.9 Once the trigger condition is satisfied s.41(4) creates a mandatory obligation to apply to the NCC for approval. There is no discretion at that point. It is obviously implicit that the NCC has a duty to consider that application.

59. The position of the Respondent in relation to the application of s.41(4) is set out below:

- 59.1 It is argued that in circumstances where the CPA has some rational basis for concluding that the granting of planning approval would have or would likely have an adverse effect, whether directly or indirectly, on a protected area or on the critical habitat of a protected species, it shall apply for the NCC's approval. In determining whether to refer the matter to the NCC, the CPA may take into consideration any comments received from the DOE pursuant to the s.7 DPA consultation process, but it is not bound to follow the advice or direction of another person, entity or statutory authority. The CPA must, taking account of the advice it has received and all relevant circumstances, weigh and determine for itself whether there is likely to be an "adverse effect" on the protected area or critical habitat.
- 59.2 The CPA's position is that if it determines that there is likely to be such an "adverse effect", then it must refer the matter to the NCC pursuant to s.41(4) of the NCA and only thereupon does s.41(5) of the NCA become operative.
- 59.3 The term "*adverse effect*", as defined in s.2 of the NCA, means: "*an effect that may cause the physical destruction or detrimental alteration of a protected area, a conservation area, an area of critical habitat or the environment generally*". In this case it is said that the CPA concluded that permitting the existing failing seawall to remain in situ would cause the least desirable outcome for the surrounding environs with the inevitable further deterioration and eventual failure of the existing wall.
- 59.4 Under the recommendation of the DOE, the Interested Party's Application was to build a new curved sea wall behind the existing, failing, seawall - only lifting out the blocks of the existing sea wall while being protected from the sea by a screen once the new curved sea wall is in place. This was not determined by the CPA to cause the physical destruction or detrimental alteration of a protected area, a conservation area, an area of critical habitat or the environment generally.
- 59.5 As the Director's 1 July 2021 memorandum did not identify any specific adverse effect on a protected area or critical habitat of a protected species, but instead sought to unlawfully and pre-emptively direct the CPA to refuse planning permission, without providing any intelligible rationale for making such unlawful directive, the CPA had no basis for finding that the provisions of s.41(4) of the NCA should be deployed and followed.

### **Discussion and analysis**

60. All parties agree that s.41(3) simply requires consultation by entities with the NCC. It is accepted that in the case of the CPA, this is done under s.7 of the DPA. Either way, it consults with the NCC as it is legally bound to do. As was outlined by Mr Jackson on behalf of the CPA and reiterated by



Mr Lowe on behalf of the Interested Party in its closing submissions, the CPA does not take a decision to consult under s.41(3). Pursuant to section 7 DPA the CPA consults as a matter of course. As explained above, it is for the NCC to review proposed actions and respond to the relevant entity with its comments. Consistent with the intention of the legislature when the NCB was being debated, pursuant to s.41(3), advice from the NCC as to the likely adverse effect of any action on the environment generally must be considered by entities as part of their decision making process, but, in cases not involving a protected area or the critical habitat of a protected species, is non-binding.

61. However, s.41(4) deals specifically with circumstances in which the taking of any action by an entity would or would be likely to have an adverse effect directly or indirectly on a protected area or on the critical habitat of a protected species. In such circumstances, the relevant entity shall apply for and obtain the approval of the NCC before taking such action. When the NCB was being debated, as quoted earlier, the Government was quite clear what was intended:

*“It is only in that case where the action being proposed has a potential negative impact on either one of those two areas that the advice of the Council is required to be followed. ....this is where the Council is acting as the surrogate of Cabinet to protect the areas that Cabinet has said must remain protected after public consultation, public input. Protected areas will always, by virtue of this Bill, be Crown property. It is possible that critical habitat areas could be on private land, however.”*

62. Having re-read s.41(4) multiple times during and after the hearing, and having considered the arguments put forward by the NCC and CPA in relation to how s.41(4) might operate, I find it difficult to agree with the contention on the part of the CPA and the Interested Party and the limited concession by the NCC, that the CPA or any other entity for that matter is left with any meaningful discretion under this sub-section. Assuming that consultation takes place under s.41(3) in accordance with the Guidance it seems to me that the process under s.41 will work as follows:

- 62.1 After consultation under s.41(3), has the NCC expressed any view about the consequence of the proposed action by an entity?
- 62.2 If no, that is the end of the matter.
- 62.3 If yes, and the NCC expresses the view that the giving of any undertaking or approval would or would likely to have an adverse effect on the environment generally and the proposed action does not involve a protected area or the critical habitat of a protected species, then the entity should consider what the NCC says but it is not binding. At this

stage, based on the response from the NCC, entities such as the CPA might choose to impose related conditions as it thinks fit<sup>22</sup> on a grant of planning permission<sup>23</sup>.

- 62.4 If yes, and the NCC expresses the view that the giving of any undertaking or approval would or would likely to have an adverse effect on a protected area or the critical habitat of a protected species, then there appears to be no option but to apply to the NCC under s.41(4). In my view, at that point the only question for the relevant entity is whether the NCC has expressed the relevant view. If it has, then an application under s.41(4) is mandatory. It is not a case of the NCC having to engage with the relevant entity to ensure that this is done, the entity is required to apply as a matter of law. It clearly is incumbent on the NCC to express its views sufficiently clearly so that there can be no ambiguity as to whether there is a likelihood of an adverse effect and whether it will involve a protected area or the critical habitat of a protected species. In my view, once that has happened then the entity has no choice but to apply under s.41(4), whether it agrees with the NCC or not.
63. In my view, that is consistent with the expressed intention of the legislature as well as the language of the NCA. The NCC through the DOE is a specialist body. To suggest that an entity has to conduct its own assessment of adverse effect or that it can seek to substitute its own decision for that of the NCC either by reaching its own view that the likelihood does not arise or that it can satisfy the concerns of the NCC through the way that it structures its undertaking or approval seems to me to subvert the intention of the legislature, the express language of s.41(4) and the Guidance.
64. In its letter dated 24 June 2021 purporting to direct the CPA to refuse planning permission the NCC raised, amongst other things:
- “...d. The potential impacts of redevelopment methods and design on the nearshore environment;*
  - e. The eventual collapse of the existing structure and the impact of that on the nearshore environment;*
  - f. The adjacent Marine Reserve (Protected Area);*
  - g. The likely direct and indirect adverse effects of the proposed planning approval on the adjoining protected area; and*
  - h. That the adverse impact of the proposed planning approval cannot be satisfactorily mitigated by conditions.”*

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<sup>22</sup> Words considered in *Fawcett Properties Ltd v Buckingham County Council* [1958] 1 WLR 1161 which said that "such conditions as they think fit" must be such conditions as a local planning authority should think fit to impose, having regard to their statutory duties and to local planning considerations.

<sup>23</sup> In the case of the CPA under section 15 (1) DPA.



65. In the conclusion to her memorandum dated 1 July 2021 the Director summarizes the position of the NCC as being that:
- “...the proposed development will result in the detrimental alteration of a Marine Protected Area and the environment generally...”*
66. The definition of adverse effect expressly refers to an effect which may result in the detrimental alteration of a protected area. In my view, it cannot have been clearer that the Director and the NCC took the view that the grant of the proposed planning permission would result in an adverse effect pursuant to s.41(4). In my view, this required the CPA to apply under s.41(4).
67. If an application is made under s.41(4) and the NCC acts under s.41(5) in a way that leaves a party aggrieved, there is an express statutory right pursuant to s.39(1)(c) for that party to appeal the decision to the Cabinet. Cabinet must give reasons for its decision<sup>24</sup>. A party aggrieved with the decision of the Cabinet may appeal to the court against that decision<sup>25</sup>.
68. As mentioned above, I have considered in particular the submissions on behalf of the Interested Party. I am of the view that its approach highlights how, in practice, it cannot be right that an entity which has no specialization or skill in matters covered by the NCA should have to or could undertake any reasonable assessment of matters such as adverse effect, likelihood or causation and have that process itself potentially subject to judicial review. To conduct such an exercise in a way, as is required, that is full and transparent, lawful, rational, proportionate and procedurally fair and demonstrably so<sup>26</sup>, would seem to me to be imposing a burden on non-specialist entities which they simply cannot discharge in any meaningful way. That cannot have been the intention of the legislature. As stated above, in my view the only question is, has the NCC as a matter of fact expressed a view that invokes s.41(4)? That should be a matter of plain English and the responsibility is on the NCC to ensure that it is clear.
69. In my view, this approach is supported by the provisions of s.41(5)(a) which specifically provide that the NCC may impose conditions on a proposed action to which s.41(4) applies. It has power under s.42 to direct that a schedule of inspections be carried out by or on behalf of the Director to ensure compliance with those conditions. Under s.43 the NCC also has power either at the s.41(3)

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<sup>24</sup> Section 39 (2) NCA

<sup>25</sup> Section 39 (3) NCA.

<sup>26</sup> See e.g. *National Roads Authority v A. Bodden, Thompson and Wright* [2014] (2) CILR 47, *In the Matter of an Application for Permanent Residence by Hutchinson-Green and in the Matter of an Application for Permanent Residence by Racz* [2015] (2) CILR 75, *South Bucks. D.C. v Porter (no 2)* [2004] 1 W.L.R. 1953 and The Cayman Islands Constitution Order 2009, s.19.

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stage or before granting approval under s.41(4) to require that an environmental impact assessment is carried out at the cost of the party who will be undertaking the proposed action. In my view, the NCA provides that the decision maker in all material respects in relation to s.41(4) is the NCC. These are not matters left to the entity in question. The role of an entity is limited to following the Guidance (for which it is expressly provided that action take in full accordance with such Guidance shall be deemed to be in compliance with the NCA), receiving any response from the NCC pursuant to s.41(3) and, if the wording of the response invokes s.41(4), making the required application.

#### **Conclusion in relation to effect of s.41(4)**

70. On that basis, and on the basis that I have found that the Director's position and that of the NCC in relation to the Application was clear; namely, that the grant of the Application would or would be likely to have an adverse effect whether directly or indirectly on a protected area or on the critical habitat of a protected species, and that the CPA was well aware of that, I have reached the conclusion that the CPA acted unlawfully in failing to act on the clearly expressed views of the Director/NCC by not applying under s.41(4) as it was required to do.

#### **Remedy**

71. There is some disagreement between the Applicant and Respondent about what remedy is applicable.
72. The Interested Party which has the most direct interest in the Application and the outcome of this case argues that:
- 72.1 Sections 41(4) and (5) do not specify the consequences for a third party of the CPA's non-compliance with s.41(4). The NCC did not at any stage suggest to the CPA that it was required to make an application under s.41(4). That point, the Interested Party says was not made until well after the Application had been granted.
- 72.2 In the circumstances, as a matter of this Court's discretion, the Interested Party says that the NCC should not be granted an order quashing the decision to grant the Application. The Interested Party relies on the commentary in Halsbury's Laws Volume 61A [109] cited by the CPA:

*"In deciding whether to grant a remedy the court will take account of the conduct of the party applying, and consider whether it has been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver of the right to object may all result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public*



*inconvenience, would result, the effect on third parties, and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment.”*

- 72.3 In any event, the Interested Party argues that it is a question of construction to determine whether the breach of section 41(4) entitles the court to quash the licence, approval or permit once it has been granted under other legislation. It is submitted on its behalf that there should be no such order given that the DPA already provides for quashing of planning permission and the NCC’s challenge is not within the planning appeal system.
73. The Interested Party also argues that:
- 73.1 Nothing in the NCA as a matter of construction suggests that a successful ex post facto judicial review challenge by the NCC renders void the planning permission already given to a third party and possibly acted upon.
- 73.2 Compliance with the obligation of the CPA to make an application under s.41(4) NCA, is not expressed to be a condition of the grant of a permit or the issue of a licence.
- 73.3 Even if the CPA made a mistake of law, it did not commit an excess of jurisdiction as its powers stem from the DPA.
- 73.4 If it had been intended that the failure to apply to the NCC nullifies the permitting process, the legislature could easily have provided for such a consequence. Such challenges are common in planning legislation but, whenever that is the case, the legislature would be expected to lay down a strict procedure<sup>27</sup>.
74. The Applicant described the Interested Party’s position on remedy as “*heretical*”. It argues that:
- 74.1 First, the Interested Party’s suggestion that “it is a question of construction to determine whether *the breach of Section 41(4) entitles the Court to quash the licence, approval or permit once it has been granted under other legislation*” is wrong in principle. It argues that the court’s remedial powers in judicial review do not come from the particular piece of legislation under consideration, but from the Court’s supervisory jurisdiction<sup>28</sup>.
- 74.2 Second, to the extent that the Interested Party seeks to draw a distinction between an error of law that is in “*excess of jurisdiction*” and an error of law within jurisdiction, then it misunderstands the modern law of judicial review. The Applicant contends that the distinction between an error in excess of jurisdiction and an error within jurisdiction was

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<sup>27</sup> DeSmith 17-024ff.

<sup>28</sup> The ancient prerogative remedies of Her Majesty’s High Court of Justice are reproduced by s.31 of the Senior Courts Act 1981 and apply to the Grand Court by s.11 of the Grand Court Act (2015 Revision).  
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swept away by *Anisminic Ltd v Foreign Compensation Commission*<sup>29</sup>; the modern position being that any material error of public law renders an administrative decision ultra vires, unlawful and a nullity (see *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, paras. 66 and 87, *per* Lord Dyson).

74.3 Third, the fact that a quashing order will affect the Interested Party does not justify allowing an unlawful decision to subsist. Third party rights are always engaged by challenges to planning permissions. The way the Court protects such third party rights is to insist that applications for judicial review are made promptly. The NCA acted with the utmost promptness: the planning permission was granted on 16 September 2021; the application for leave was issued on 30 September 2021; and the planning permission was stayed by the Court on 14 October 2021.

75. In my view it was not for the NCC to invite or require the CPA to make an application under s.41(4). As I have found, the section was invoked by the DOE/NCC expressing its views in the way that it did and it was then a mandatory requirement for the CPA to have made an application under s.41(4). In choosing not to do so, it acted unlawfully. Although quoted earlier, it is useful to be reminded of s.41(1) which states:

*“General obligations*

*41. (1) Subject to subsections (2), (3) and (4), every entity shall comply with the provisions of this Law and shall ensure that its decisions, actions and undertakings are consistent with and do not jeopardise the protection and conservation of a protected area or any protected species or its critical habitat as established pursuant to this Law.”*

76. The NCA is clear, every entity shall comply with the provisions of the NCA. It seems to me that as argued by the Applicant, the natural consequence of the CPA breaching the terms of the NCA in respect of the Application in the way that it did and thereby acting unlawfully is to render its subsequent decision in relation to the Application a nullity. On that basis, its decision to grant planning permission to the Interested Party is hereby quashed.

#### **Additional matters**

77. At the conclusion of the hearing, I felt that there had been sufficient adjustment of the respective positions of the parties for each to have the opportunity of summarizing their final positions in writing. I made it clear that I did not want there to be any further argument and expected those submissions to be confined to matters that had been argued. In its closing submissions the CPA reiterated an issue which is what it describes as a statutory conflict between the DPA and NCC in

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<sup>29</sup> [1969] 2 AC 147.



that a directive by the NCC to the CPA pursuant to s.41(5)(b) would contravene s.1.2 of the Development Plan formulated under the DPA, a conflict which by virtue of s.51(2) of the DPA which is a savings section, should be referred to Cabinet for resolution. It also reiterated a question under s.9(6) of the Public Authorities Act which provides that public or civil servant board members shall not be entitled to vote or the CPA says chair any board of a public authority. On this basis it says that the Director cannot lawfully exercise the powers of the entire NCC and take it upon herself to refuse permission under s.41(5)(b). Neither issue was argued before me in any substantive way but I will deal below with the question of the role of the Director as it is relevant to the question of delegation which I have been asked to consider.

### **Delegation generally and meaning of “direct”**

78. The one issue that had been canvassed in some detail by the parties prior to and during the hearing but which ultimately was not determinative in this case, is the question of the delegation of powers by the NCC to the Director. As mentioned earlier, the NCC and CPA have requested that I consider the issue because it is likely to arise again in the future and will therefore benefit from review.
79. The relevant law in relation to delegation is that:  
*“A discretionary power must, in general, be exercised only by the public authority to which it has been committed. It is a well-known principle of law that when a power has been conferred to a person in circumstances indicating that trust is being placed in his individual judgement and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another.”*<sup>30</sup>
80. Section 3(13) has been referred to above on a number of occasions and provides expressly for the delegation of any of the functions of the NCC to the Director other than the making of orders or the giving of directives.
81. The Respondent approaches the question of delegation starting with s.3(12)(i) NCA which provides how the NCC may exercise its powers under the NCA:  
*“The Council, subject to any directions of the Cabinet, may make orders and guidance notes and issue directives for the purpose of giving effect to the provisions of this Law.”*
- 81.1 Section 3(13) NCA provides what the NCC may delegate to the Director:  
*“The Council may delegate any of its functions, other than the making of orders and the issuing of directives, to the Director or to any committee or sub-committee of its members”*

<sup>30</sup> DeSmith’s Judicial Review, 8<sup>th</sup> edn, para 5-159.



- 81.2 The Respondent refers to s.3(2) of the Interpretation Act (1995 Revision) which provides that every Act shall be applied according to the plain reading. Section 12(1) of the Interpretation Act provides that expressions defined shall have the meanings assigned to them unless there is anything in the subject or context repugnant to, or inconsistent with such meaning. Section 12(3) of the Interpretation Act provides:
- “Where a word is defined in a Law or any regulations, other parts of speech and grammatical variations of that word, and cognate expressions, shall have corresponding meanings in that Law or those regulations.”*
- 81.3 As set out above, s.2 NCA defines “direction” and “directive” but does not define “guidance notes”, “direct” or “order”. The Respondent’s position is that in this context, “order” means to command; to direct authoritatively (a person to do something) per the Oxford English Dictionary. The Respondent highlights the distinction between “directions” “directives” “orders” and “guidance”. “Directions” are reserved exclusively to Cabinet and therefore the NCC could not enjoy the ability to issue a “direction”, let alone delegate the same to the Director. It says that “directives” and “orders” are “rules” that are required to be followed. “Guidance”, it says, is different. Guidance should not contain “directives” but should be instructive, to explain, procedures for consultation.
- 81.4 The Respondent refers to the case of *Bovale Ltd v Secretary of State for Communities and Local Government and others*<sup>31</sup> which dealt with the difference between “guidance” and “direction”. Stanley Burnton LJ said at page 2299 paragraph 78: *““direction” in the statute is used in the sense of, to use one of the definitions in the Oxford English Dictionary “an instruction how to proceed or act; an order to be carried out, a precept”. In other words, it is or includes mandatory provisions.”*
- 81.5 The Respondent says that s.3(13) must be construed in the context of s.3 which sets out the functions of the NCC. The enumerated functions set out in s.3 include no reference to directing the CPA to refuse planning permission. It argues that the authority to delegate is restricted to the NCC's s.3(12) function of issuing “guidance notes” and not the NCC's discretion to approve or direct refusal of planning permission under s.41(5). The function of issuing “guidance notes” is that they be an explanatory guide, not a directive or order. It follows that under s.3(13) the NCC cannot delegate to the Director the function to direct or order the CPA to refuse planning permission.
- 81.6 If there is ambiguity in the meaning of “direction”, “directive” and “guidance notes” under the NCA, then per the decision of Ramsay-Hale, J., in *Annette Diane Eden Andrade v*

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<sup>31</sup> [2009] 1 W.L.R.

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*Patrice Leanna Frederick* of 18 August 2020, the Respondent says that recourse to Hansard may be had in order to discern the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. It is submitted by the Respondent that Hansard will evidence that Parliament was careful and mindful as to the use the words “orders” and “directives” and “guidance notes” throughout the NCA.

82. The Applicant’s position is that s.3(13) is structured by starting with an unlimited power of delegation (“*any of its functions*”) before carving out “*the making of orders and the issuing of directives*”. Accordingly, it says, the question of construction is whether the exercise of the s.41(5) power constitutes the making of an order or the issuing of a directive, so as to be carved out of the general power of delegation.

82.1 The Applicant says that a superficial glance at section 41(5) might suggest that the power involves the “*issuing of a directive*” because it uses the words “*the Council shall so direct*”.

82.2 However, s.41(5) does not use the words “*issue a directive*”. The Applicant argues that if the legislative drafter had intended that a s.41(5)(b) refusal of approval should have the legal consequences of a “*directive*”, then it would have been easy for him or her to use the term “*directive*”. For example, rather than state “*the Council shall so direct the originating authority*”, the drafter could easily have stated “*the Council shall issue such a directive to the originating authority*”. The Applicant refers to examples of where the drafter had no difficulty using the term “*directive*” when that is what he or she meant. The fact that the drafter did not use the term “*directive*” in s.41(5)(b) indicates that such a refusal is not intended to constitute a “*directive*”.

82.3 Moreover, the Applicant argues, the process of statutory construction requires words to be interpreted in context. The Applicant relies on Lord Steyn in *R (Westminster City Council) v National Asylum Support Service*<sup>32</sup>, where he said:

*“...language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it”.*

82.4 The Applicant contends that the context in which the terms “*direct*” and “*directive*” are used in the NCA shows that a decision to “*direct the originating authority*” under s.41(5)(b) is not a directive within the meaning of s.3(13). It argues that it is perfectly clear

<sup>32</sup> [2002] 1 WLR 2956, para.5.



from the language, structure and purpose of the NCA as a whole that a s.41(5) requirement to refuse permission is not “*the making of an order*” or “*the issuing of a directive*”.

83. As to the language, structure and purpose of the NCA, the NCC makes the following points:

83.1 Section 41(5) provides for the NCC to make an individual decision on a one-off action by an entity. The requirement for an individual decision arises whenever the proposed action is likely to have an adverse effect on a protected area or critical habitat. In some cases the adverse effect will be major (and thereby give rise to strategic concerns on the part of the NCC). However, in other cases the adverse effect will be comparatively minor. For example, the discharge of pathogens at a level that harms wildlife or the discharge of waste that harms the aesthetic value of an area. There will inevitably be a vast number of actions proposed by entities which are likely to have minor adverse effects on a protected area or critical habitat.

83.2 By contrast, the term “*directive*” is used in the NCA in relation to the setting of overarching rules and procedures (which are then to be applied to individual decisions) rather than to the making of the individual decisions themselves. The prohibition on delegating the making of orders and the issuing of directives contained in s.3(13) is immediately preceded by a list of examples at s.3(12) of the kinds of things that “*orders, guidance notes and directives*” may cover. The list indicates that directives are intended to set out the rules or criteria and procedures to be applied to individual decisions. For example, “*criteria for evaluating proposals for the establishment and management of protected areas*” (s.3(12)(b)) and “*procedures for determining the circumstances under which permits and licences ...*” (s.3(12)(f)).

83.3 The list of things that “*orders, guidance notes and directives*” may cover expressly refers to “*procedures for consultation by entities pursuant to section 41(3)*” (s.3(12)(i)). The list conspicuously does not include the making of individual decisions under s.41(5).

83.4 Section 2 provides that “‘Law’ includes any regulation, directive, order, direction and management or conservation plan given, made or adopted under this Law”. Law has the character of governing rules rather than individual decisions.

83.5 The Applicant argues, the NCA repeatedly draws a distinction between “*making a directive*” and directing something. Thus, for example: s.11(4) provides, in relation to directives contained in a management plan:

*“The Council shall report the making of an interim directive under subsection (3) to the Cabinet and the directive shall cease to have effect on the commencement of a management*



*plan for the protected area concerned or at such earlier time as the Council or the Cabinet may direct”.*

- 83.6 The Applicant says that it would, to say the least, be an odd use of language to conclude that directing the cessation of a directive itself constitutes the issuing of a directive.
- 83.7 Section 12(2), which concerns the making of an order to remove the designation of any land as a protected area, provides: *“An order by the Cabinet under this section shall include reasons for removing the designation of any land as a protected area and may direct the Council to identify a similar area under section 9 to replace the area from which the designation has been removed where the Council has not already done so”*. Thus, an *“order”* can *“direct”* a person to do something. Given that an order is distinct from a directive, this again says the Applicant indicates that the legislative drafter drew a distinction between decisions which serve to direct someone to do something and *“issuing a directive”*.
- 83.8 Section 31(1) provides that: *“A person who contravenes this Law commits an offence”*. Section 2 provides that *“person”* includes any entity, such as the CPA. As set out above, *“Law”* includes any regulation, directive, order, direction and management or conservation plan given, made or adopted under this Law”. It follows that it is a criminal offence for the CPA to contravene a directive. Again, the Applicant says this indicates that directives are intended to set out generally applicable rules rather than individual decisions. If the CPA were right to conclude that a refusal to give consent under s.41(5)(b) constitutes a directive, that would have what the Applicant describes as the startling consequence that a grant of planning permission by the CPA contrary to a valid s.41(5)(b) decision would constitute a criminal offence.
- 83.9 Under s.41(5)(a), the NCC may require the CPA to refuse to grant planning permission unless certain conditions are imposed (the NCC may *“agree to the proposed action subject to such conditions as it considers reasonable, in which case the originating authority shall ensure that the proposed action is made subject to such conditions”*). There is no suggestion that the NCC’s function under s.41(5)(a) involves the issuing of a directive, because there is no word (like *“direct”*) which bears any resemblance to the word *“directive”*. The Applicant says that it would very odd if the power to require outright refusal (s.41(5)(b)) involves the issuing of a directive, but the power to require refusal unless certain conditions are imposed (s.41(5)(a)) does not. The Applicant suggests that this strongly tells against taking the word *“direct”* in s.41(5)(b) to mean *“issue a directive”*.



83.10 If the s.41(5)(b) power involves the issuing of a directive and the s.41(5)(a) power does not, then the Applicant contends that the s.41(5)(a) power could be delegated to the Director, but the s.41(5)(b) power could not. Thus, the Director could be charged with considering a request for approval from the CPA under s.41(4). She could (under delegated powers) require the CPA to refuse permission unless it was subject to a condition (for example) that no work could commence until the CPA had received and approved a coastal engineer. However, on the CPA's case, she could not require outright refusal under s.41(5)(b) power without convening a full meeting of all 13 voting members of the Council. This would impose an undue burden on the NCC. It would mean that every single time the NCC was required to consider any individual request for approval from an entity, no matter how minor, the NCC would have to convene a full meeting of the NCC. That, in turn, the Applicant says would be contrary to the interests of those seeking approval, such as the CPA and the Interested Party, because they would have to wait until it was possible to convene a full meeting of the NCC.

83.11 There is no need to read "*direct*" (in s.41(5)(b)) to mean the giving of a "*directive*" in order to safeguard the rights of those who seek to take action which would be likely to have an adverse effect on a protected area or on the critical habitat of a protected species. This is because such persons are protected by the right of appeal to the Cabinet and thereafter the right of appeal to the Grand Court which is given by s.41(6) and s.39 of the Act.

### Discussion and analysis

84. I can add to the list above by referring to s.42(1) which provides that:

*"At the time that the Council agrees to a proposed action subject to conditions imposed pursuant to section 41(5)(a), it may, in its discretion, direct that a schedule of inspections be carried out by or on behalf of the Director to ensure compliance with the conditions."*

85. Additionally, in my view, it is instructive to review the use in the NCA of the word "*order*". Section 2 defines a "*cease and desist order*" as an order under s.30(1); s.30(1) provides that:

*"The Director may, without prejudice to any other proceedings under this Law, issue an order in writing to any person — (a) who performs any act which would be an offence under this Law, or permits any other person to do so, requiring him to cease and desist the unlawful act forthwith or by such date as may be specified in the order ..."*

86. It is interesting that the NCA gives this express power to the Director to make an order, notwithstanding the provisions of s.3(13) which means that it is not a function that the NCC could delegate.



87. There are a number of instances where sections of the NCA provide for the Cabinet to make orders. For example, s.7 provides that:

*“The Cabinet may, after consultation with the Council and adjoining land owners, by order designate any area of Crown Land or Cayman waters as a protected area in accordance with this Law.”*

88. In the context of designation of an area for protected status, section 8 (4) provides for Cabinet making a protected area order. Section 16(1) provides that:

*“Subject to the following provisions of this section, the Council, with the approval of Cabinet, may make by order such modifications to Schedule 1 as it considers necessary or desirable.”*

89. Having considered the respective arguments of the parties in relation to the meaning of “direct” I am of the view that when reading its use in the context of the NCA as a whole as described by Lord Steyn in *R (Westminster City Council) v National Asylum Support Service*, it cannot be regarded as being the equivalent of a direction, directive or an order. The NCC has wide powers and its functions as set out in s.3(9) include:

*“(n) carrying out such other functions and duties as are specified under this Law and the regulations.”*

The Respondent suggests that the functions set out in s.3(9) contain no reference to directing the CPA to refuse planning permission. It is correct to say that there is no specific reference to that function but it clearly is a function of the NCC and therefore is covered by s.3(9)(n).

90. Directives are defined and include in s.3(12) (but are not limited to) covering matters such as setting criteria, measures and procedures which are, albeit within the context of the NCA, of general application as opposed to relating to specific individuals or issues. Similarly, guidance notes are expressed to be relating to the same generic issues. It is also important to note that the section makes it clear that the exercise of the NCC’s power to issue orders, directives, and guidance notes is subject to any directions of the Cabinet. The functions of the NCC as set out in s.3(9) are not so limited.

91. As I have mentioned earlier, I have reviewed the relevant extract of the Official Hansard Report and it is clear that a great deal of time was spent on the precise words used in the NCA. In relation to s.41(2) for example, the wording was changed so that instead of referring to the NCC issuing directives to entities in relation to their duties to consult, it refers to guidance notes.

*“Now, Madam Speaker, [clause] 41, that troubling clause that the Minister told us he has neutered. I think he has changed it to read...deleting the words “directives giving” and*



*inserting the words "guidance notes". I am assuming that that is for every place that "directives" is placed in 41. Replace it with "guidance notes" to make it advisory."*<sup>33</sup>

92. Although not defined, orders also seem to be fairly clearly characterized in the NCA and relate to decisions or orders of Cabinet, specific orders made by the NCC and cease and desist orders made by the Director.
93. I do not think therefore that there is any ambiguity about the meaning and usage of the terms orders, directives, and guidance notes. It also seems to me to make sense that the NCC cannot delegate orders and the issuing of directives. As mentioned earlier, in the context of the NCA, orders are either issued by the NCC (subject to decisions of Cabinet), Cabinet itself or by way of cease and desist orders issued by the Director. In my view, in none of those instances would it be possible for the NCC to delegate the relevant function. Directives are similarly subject to the decisions of Cabinet.
94. It is also notable that when introducing the NCB for its second reading the Minister described the role of the NCC as follows:
- "In respect to decisions like designating protecting areas, approving species conservation plans, and therefore also approving any critical habitat areas, those decisions are exclusively for Cabinet. The Council does not make any decision in that respect. It makes recommendations and it gives advice to Cabinet and those decisions are made. So, the Council is purely a technical advisory body for the vast majority of the time. The only time, Madam Speaker, that the Council would have any real authority is in relation to applications which have an impact on protected areas or critical habitat areas that Cabinet has already gone through with the assistance of a significant public consultation process and made a decision that those should be protected areas and critical habitat areas. So, the Council's only real authority under the Bill is for the purpose of protecting areas that Cabinet has already deemed should be protected with the assistance of the public."*<sup>34</sup>
95. It is the powers such as those under s.41 that enable the NCC to protect protected areas or critical habitat. In view of the significance of the s.41 powers it seems to me that the fact that the carve out in s.3(13) only refers to orders and directives is intentional. That leads to the conclusion that as the s.41 powers must fall within s.3(9)(n), they must also fall within the functions that are capable of being delegated in accordance with s.3(13).

<sup>33</sup> Hansard 2013/14 Session, 11 December 2013, page 408.

<sup>34</sup> Hansard 2013/14 Session, 11 December 2013, page 395.



### Conclusion as to meaning of “direct”

96. In my view, it is not correct to suggest that the word “direct” can fall within directives, direction or orders. In my view, a common sense reacting of s.41 means that the word direct must be read as the equivalent of “instruct” or, as used in s.43(1) in the context of environmental impact assessments, “require”. In my opinion to read it otherwise makes no sense.

### Delegation of discretion

97. That, however is not the end of the argument over delegation. Regardless of the wording of the NCA, the Respondent argues that it is a general principle of public law that where a public body has a decision-making power, it must exercise that power itself and it cannot approach its task in such a manner that results in it abdicating its decision-making function in favour of another body. It says that this is true both for the NCC, and the CPA.

98. *Lavender and Son Ltd v Minister of Housing and Local Government*<sup>35</sup>, was a judicial review where the relevant planning authority refused permission on grounds of the objection maintained by the Minister of Agriculture, even though it had no objection on either amenity or highway grounds. It was held that the duty to decide whether planning permission should be granted had been entrusted by Parliament to the Minister of Housing who as a result of a self-created rule of policy had wrongly fettered himself in such way that it was not he who made the decision but it was in effect delegated to the Minister of Agriculture. The unlawfulness of the action was both as a fettering of discretion and as an unlawful delegation. Willis J, said (at page 1241):

*“Everything else might point to the desirability of granting permission, but by applying and acting on his stated policy I think the Minister has fettered himself in such a way that in this case it was not he who made the decision for which Parliament made him responsible.*

99. The Respondent also referred to *National Trust for The Cayman Islands and Connolly v Planning Appeals Tribunal and Humphreys (Cayman) Limited*<sup>36</sup>, which was a decision of the Cayman Islands Grand Court in which Sanderson J. was asked to consider, *inter-alia*, whether the CPA had unlawfully delegated its duty to reach an independent decision by granting permission subject to the approval of an environmental report by the DOE. Sanderson J. held that it was the function of the CPA to consider within the scope of the relevant Development Plan, all relevant matters affecting its discretion, including environmental aspects. Sanderson J, stated (at page 540):

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<sup>35</sup> [1970] 1 WLR 1231.

<sup>36</sup> [2000] CILR 521.

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*“The function of the Central Planning Authority is to consider, within the scope of the Development Plan, all of the long- and short-term effects that a proposed development could have on the residents of these Islands. It must consider things such as noise, congestion, appearance, disruption, inconvenience, additional jobs, economic growth, tourism and all other factors which it believes will affect those who live, work and visit here. It must then exercise its best judgment to determine if there are environmental impacts and, if so, how significant they are and whether they can be minimized or reduced in some way. It must also consider what environmental impact is justified given the advantages or benefits of the proposed development. Simply put, it is to decide what is in the public's best interest, given the particular circumstances of each case. Did the Central Planning Authority do that here or did it delegate that decision-making authority? In my judgment, it did delegate the decision-making authority that it was required to exercise and accordingly its decision must be set aside... In this case, the Department of Environment was being asked to perform the function of determining if any potential negative impact on the environment was justified, considering the benefits of the development. That is not its function.”*

100. Finally, the Respondent referred to the dicta of Hercules, Ag CJ in *Ebanks v Central Planning Authority*<sup>37</sup>, was applied in the *National Trust* case. Hercules, Ag CJ said at page 211:

*“The Central Planning Authority is a statutory body charged with all legal authority to discharge its functions under the Development and Planning Law. As such it must act on matters coming before it independently of advice or comment from any other body or authority. Any decision made by this body must be its own independent decision uninfluenced by any outside influence whatsoever. There can be no abdication of its authority ... I have searched the Development and Planning Law, albeit without any success whatever, to find whether there is any section in it giving authority to the Central Planning Authority to abdicate its statutory rights to any other authority or any other body”.*

101. It is submitted by the Respondent that there is no express or implied authority to delegate the NCC's discretion under section 41(5) of the NCA.

102. The Interested Party reiterated some of the submissions of the Respondent which I have not repeated.

102.1 It submits that s.3(13) must be construed strictly. Mr Lowe on behalf of the Interested Party cites *Noon v Matthews*<sup>38</sup> in which Beatson LJ observed in that there is “a strong presumption against interpreting a grant of legislative power as empowering delegation”. Mr Lowe also repeats the basic position that as a general matter of public law a public body which is granted a decision-making power cannot delegate the same<sup>39</sup>.

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<sup>37</sup> [1980-83] CILR 207.

<sup>38</sup> [2014] EWHC 4330 Admin.

<sup>39</sup> *Lavender & Son v Ministry of Housing*, and *De Smith* 8<sup>th</sup> edn 5-159 to 5-164.

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- 102.2 It is submitted on behalf of the Interested Party that s.41(5)(b) is not merely about the exercise of the “function” of directing the CPA to withhold the grant of permission; it also requires the NCC to make a judgment about whether or not the adverse effect is incapable of being mitigated. This, the Interested Party says, is a decision-making power which can be the subject to appeal or legal challenge.
- 102.3 In excepting from the power of delegation “*the making of orders and the issuing of directives*”, s.3(13) is likely to have been concerned with the powers and duties which affect private parties so that the NCC would remain accountable as a public body by way of judicial review.
- 102.4 The Interested Party says that it cannot be possible under s.3(13) to delegate the major decision-making powers under s.41(5)(b) because that would suggest a legal challenge would be made by reference to the decision-making of someone other than the NCC.
- 102.5 It argues that the legislation, taken as a whole, points to the importance of placing strict limits on the power to delegate: It says that the NCC was established under s.3(1) as a statutory body to carry out important functions under the NCA as listed in s.3(9). It argues that it is no accident that the law was passed shortly after the Constitution was brought into effect which itself imposed an environmental duty<sup>40</sup>. By enacting the NCA, the Government sought to comply with its constitutional duty to the environment. It is not surprising the Interested Party says that in such an important body, the legislature would have sought to limit the power of delegation.
- 102.6 Similarly, it says that it would be expected that a statutory body designed to supervise such important legislation was established and organized to make decisions that were transparent and accountable. Accordingly, the NCC consists of 9 members (see s.3(2)) and decisions of the NCC must be made by a majority of members (see s.3(4)). Its meetings must be public (see s.3(6)). Delegation, the Interested Party argues, detracts from this.
- 102.7 The NCA goes to some lengths to manage the way in which the NCC exercises powers and carries out functions. Section 3(13) above is one of a number of provisions dealing with the NCC’s ability to engage others to do its work.
- 102.8 It argues that the NCC’s ability to engage third party agencies to exercise its powers is subject to agreement by Cabinet. Thus s.3(10) provides that:

*“3(10) In carrying out its powers and duties the Council may, subject to any directions of the Cabinet, enter into agreements and other co-operative arrangements with regional agencies, interstate agencies, voluntary organisations and other persons for the purpose of this Law and the Conventions.”*

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<sup>40</sup> Section 18 of Part 1 of The Cayman Islands Constitution Order 2009.  
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- 102.9 Section 3(11) then specifies the types of arrangements that may be made under s.3(10) which do not on their face permit the NCC to delegate the carrying out of its general decision-making or the specific powers allocated to it under s.41.
- 102.10 The NCA also then allows arrangements to be made for the exercise of specific powers.  
*“(12) The NCC, subject to any directions of the Cabinet, may make orders and guidance notes and issue directives for the purpose of giving effect to the provisions of this Law.....”*
- 102.11 These it is argued do not include the power of determining the matters which are left to the NCC to resolve under s.41(5) NCA.
103. In response to the various points made by the Interested Party the Applicant says that the contention that: *“It cannot be possible under Section 3(13) of the NCA to delegate the major decision-making powers under Section 41(5)(b) of the NCA because that would suggest a legal challenge would be made by reference to the decision-making of someone other than the NCC”* is misconceived:
- 103.1 First, the Applicant says that such an argument misunderstands the public law nature of delegation. It argues that a decision taken on behalf of the NCC by the Director under delegated powers is, in law, a decision of the NCC, not a decision of the Director. Any legal challenge would be against the NCC, not the Director.
- 103.2 The NCC agrees with the proposition, advanced by the Respondent and the Interested Party that where a public body is vested with a decision-making power it must ordinarily exercise that power itself. However, it points out that, as I mentioned earlier, that is subject to any express statutory power of delegation<sup>41</sup>. The NCC does not contend that it has an inherent power to delegate its functions or that a power of delegation should be implied into s.41(5) NCA. Rather, s.3(13) NCA gives the NCC an express power to delegate its functions.
- 103.3 The Applicant argues that contrary to the Interested Party’s assertion, there is no principle of restrictive interpretation of an express statutory power of delegation. It contends that the Interested Party’s reliance on *Noon v Matthews* [2014] EWHC 4330 (Admin) is misplaced because Beatson LJ was addressing *“the question of whether statutory provisions impliedly authorise delegation”*<sup>42</sup>. This case is concerned with an express statutory power of delegation.

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<sup>41</sup> And other well-recognised exceptions such as the *Carltona* (*Carltona Ltd v Commissioners of Works* [1943] 2 All E.R. 560) principle under which the courts have recognized that *“the duties imposed on ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case”* and De Smith’s *Judicial Review* 7<sup>th</sup> edn para 5-185.

<sup>42</sup> Paragraph 26.



## Discussion and analysis

104. The cases cited by the Respondent and Interested Party do not deal with situations in which there was a clear statutory power to delegate functions and there had been purported express delegation of such functions. As such, I do not think that they advance the position of the Respondent or the Interested Party.
105. I return to the point that I made earlier which is that the legislature was cognizant of the fact that the NCC has limited authority, largely confined to s.41. When providing for an express power to delegate its functions no effort was made to limit that power beyond the matters already discussed.
106. As the Applicant has highlighted, in s.39(1) (e) there is a specific right of appeal to Cabinet against a decision under section 41 and that appeals are stated to be against the decision of the NCC. In that way, Cabinet retains its key role in overseeing the NCC and, in turn, the protection of the environment. To the extent that the delegation of the s.41 function includes the exercise of discretion, I am satisfied that the intention behind and effect of s.3(13) was to provide for the delegation of the exercise of that discretion to the Director and that decision is to be treated as one taken by the NCC itself. It is therefore the NCC that is the respondent to any appeal. The delegation to the Director as evidenced in the Cayman Islands Gazette<sup>43</sup> confirms that the Director shall report to the NCC on the exercise of her powers on a regular (ordinarily) monthly basis and, in that way, the NCC appears to retain a close supervisory role in relation to the activities of the Director, who as I have stressed on a number of occasions is (along with a number of her staff) a member of the NCC itself. In view of the rights of appeal under s.39, it clearly is incumbent upon the NCC to record its decisions and ensure that those of the Director are recorded in a careful and thorough manner.
107. In view of the integral roles that the Director and the DOE have in the NCC, I do not agree with the suggestion that the exercise of such discretion cannot be delegated to the Director. It seems to me that the decision to exercise powers under s.41(5) requiring the imposition of conditions on a proposed action or a direction to an entity to refuse to agree to or refuse to proceed with proposed action cannot sensibly be separated from the communication of those conditions or the directing of the entity. They are, in a sense interwoven, and any exercise of discretion must, in my view, be capable of being delegated as part of the functions under s.41<sup>44</sup>.

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<sup>43</sup> Discussed in more detail below.

<sup>44</sup> See e.g. *Mungoni v Attorney General of Northern Rhodesia* Privy Council Appeal no 14 of 1959. *220823 National Conservation Council v The Central Planning Authority et al - Judgment Final*

## Delegation to the Director

108. The final point in relation to delegation is whether functions can be delegated to the Director herself.
109. I referred earlier to the composition of the NCC and the significance that the Director and specified members of the DOE have in the composition of the NCC. There seems to me to be no doubt that the intention of the legislature was to make the Director and specified members of the DOE an integral part of the NCC and its decision making process, albeit not a majority of the members given a vote.
110. The Respondent makes reference to the Public Authorities Act (2020 Revision) (PAA), which provides uniform regulation of the management and governance of public authorities. In its comments on my draft judgment, counsel for the NCC stated that the NCC is not in fact a “public authority” which is defined in s.2 of the PAA as being either a statutory authority or a government company. In turn, “statutory authority” is defined as:
- “an entity established by a law to carry out functions which are capable under that law, of being funded, partly or entirely, by money provided by the Cabinet, and for which the Governor or the Cabinet has the power to appoint or dismiss the majority of the board or other governing body.”*
111. The NCC says that it is not funded by Cabinet. This is not an issue that was argued in any detail before me and there is no evidence in relation to the status of the NCC. Regardless, as my decision below explains, even if the NCC is a public authority, I do not regard the PAA as imposing any restrictions on its power to delegate to the Director.
112. Under the PAA as of the 1 June 2019, all statutory authorities have become “public authorities” and are to comply with the PAA, including that public or civil servant board members may not vote or chair any board of a public authority<sup>45</sup>, and that board resolutions must be determined by a simple majority of those members entitled to vote, which excludes all civil servants<sup>46</sup>. The Respondent says that the Director, a civil servant, cannot lawfully exercise the powers of the NCC and take it upon herself to refuse permission under s.41(5)(b) of the NCA as that would not be concordant with the clear legislated intent of the PAA.

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<sup>45</sup> Section 9(6) PAA.

<sup>46</sup> Section 17 PAA.

## Discussion and analysis

113. The purpose of the PAA is set out in s.4 which states that it is:

*“(1)... to provide uniform regulation of the management and governance of public authorities.”*

but makes it clear that:

*“(2) Nothing in this Law shall be construed as affecting the principal functions of any public authority and shall not affect the independent regulatory decision making process with regard to the issue or suspension of licenses, and any other regulatory decision.”*

114. Whilst a public or civil servant board member shall not be entitled to vote as a member of the board of a public authority<sup>47</sup>. The PAA does provide for the appointment by a board of a chief executive officer<sup>48</sup> who shall also be a non-voting member of the board. A chief executive officer has wide powers as set out in s.31(2) PAA including *“any other responsibilities as provided in writing by the board”*<sup>49</sup>. The PAA does not place any restrictions on who may be eligible to be appointed to such a role.

115. A chief executive officer has a statutory power of delegation and can delegate any of the responsibilities that they are given under s.31(2) to a staff member.<sup>50</sup> There is no limitation on who that staff member may be.

116. Taking all of that into account, and subject to the question as to the actual status of the NCC, I do not follow the Respondent’s logic in relation to the relevance of the PAA to the question of the NCC’s statutory power to delegate functions to the Director. If the PAA does apply to the NCC, the effect of the PAA may well be that the Director, as well as any other civil servant, is unable to vote as a member of the board of the NCC, but there is nothing in the PAA whether express or implied that seems to me to impose any restriction on the power given to the NCC to delegate functions to the Director. I also do not agree that delegating functions to the Director is inconsistent with the PAA, Indeed, s.4(2) PAA seems to make it clear that the intention is that the PAA should not stray into such areas.

117. The next question is whether the delegation has been clearly evidenced. At the hearing I was advised by Mr Buttler that the issue of delegation to the Director had moved on somewhat from the

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<sup>47</sup> Meaning a statutory authority or government company (PAA s.2).

<sup>48</sup> Section 24 PAA.

<sup>49</sup> Section 31(2)(j) PAA.

<sup>50</sup> Section 32 PAA.



point in time at which the letter of 24 June 2021 directing the refusal of the Application was sent on the letter head of the NCC to the CPA. After reviewing various documents including minutes of the NCC meetings in 2014 and 2017 in connection with that question, Mr Buttler accepted that, to the extent that there was evidence of the decision to delegate and what it was intended to delegate, that evidence was badly drafted and it was most definitely unclear.

118. At a meeting of the NCC on 21 July 2021 the question of delegation was re-visited and clarified. That decision was publicised in the Cayman Islands Gazette on 30 August 2021 as follows:

*“DEPARTMENTAL NOTICES*

*NATIONAL CONSERVATION COUNCIL DELEGATION OF FUNCTIONS TO THE DIRECTOR OF THE DEPARTMENT OF ENVIRONMENT*

*Pursuant to section 3(1[3]) of the National Conservation Act, 2013, and as resolved at its General Meeting of 21 July 2021[1], the National Conservation Council (the “Council”) makes the following delegation to promote the efficient and effective functioning of the Act.*

*A. For the purpose of this delegation, and in keeping with the Act, “Director” means the Director of the Department of Environment and that “Act” means the National Conservation Act, 2013.*

*B. In keeping with section 5 of the Interpretation Act (1995 Revision), reference to the “Director” includes any person for the time being, holding or carrying out the duties of that office in the Islands.*

*C. Pursuant to section 3(13) of the Act, the Council delegates to the Director all functions and powers of the Council under section 41 of the Act, including but not limited to the issuing of instructions under section 41(5), the imposition of conditions under section 41(5)(a) and binding instructions to an originating authority under section 41(5)(b) directing the originating authority to refuse to agree to or refuse to proceed with the proposed action.*

*D. This delegation of functions and powers to the Director under section 3(13) of the Act includes, but is not limited to receiving, processing, imposing conditions or directing refusal at the Director’s discretion, executing and communicating such decisions/actions.*

*E. The Director shall not sub-delegate any powers or functions delegated to her by the Council.*

*F. The Director shall continue to adhere to any Directives, Guidance Notes, Orders, Regulations or Resolutions of the Council in force at the time, and the principles of natural justice and lawful administration. In this regard, the Director shall also ensure that:*

- (i) The originating entity is notified of the right of a person aggrieved by a decision of the Council to appeal that decision to the Cabinet, under section 39 of the Act; and*
- ii) For all matters likely to trigger an Environmental Impact Assessment or a Strategic Environmental Assessment, the Director shall act in accordance with the EIA directive 2016.*

*G. The Director shall continue to report all activities in relation to the exercise of these delegated functions/powers to the Council on a regular (ordinarily monthly) basis.*



*H. The Director may consult in relation to any application, any relevant authorities or individuals, including persons affected by or proponents of the proposed action.”*

119. So for present purposes, there is no doubt as to what the NCC intends; the evidence of delegation is now clear and, in my view, unambiguous.

#### **Conclusion in relation to role of Director**

120. On that basis, I find that section 3 (12) does give the NCC power to delegate its powers under section 41. I am also satisfied that there is nothing in the NCA or the PAA (if relevant) which prevents the NCC delegating such powers to the Director and that such delegation has been clearly implemented by way of the decision of the NCC as evidenced in the Gazette.

#### **Summary of conclusions**

121. By way of summary, my findings are as follows:

121.1 The Guidance is lawful and binding.

121.2 Entities do not have anything other than a very limited discretion under s.41(4), extending no further than a plain reading of responses from the NCC received after consultation under s.41(3). It is not for entities to conduct their own environmental assessment to determine whether to make an application under s.41(4).

121.3 The CPA acted unlawfully in failing to apply to the NCC under s.41(4).

121.4 The consequence of that is that the decision to grant the Application was a nullity and is quashed.

121.5 The NCA provides the NCC with an express power of delegation which includes the powers under s.41(5).

121.6 It is lawful for the NCA to delegate such powers to the Director.

122. I have invited the parties to make submissions on costs which I will deal with separately.

A handwritten signature in black ink, appearing to read "A. Walters", written over a horizontal line.

**Hon. Mr Justice Alistair Walters  
Acting Judge of the Grand Court**