



AND COURT OF THE CAYMAN ISLANDS

CAUSE NO: G of 2025

IN THE MATTER OF AN APPLICATION FOR LEAVE TO SEEK JUDICIAL
REVIEW

BETWEEN

THE KING

On the application of

(1) THE PROPRIETORS OF STRATA PLAN 148 (THE PALMS)

(2) THE PROPRIETORS OF STRATA PLAN 3 (SILVER SANDS)

Applicants

AND

PLANNING APPEALS TRIBUNAL

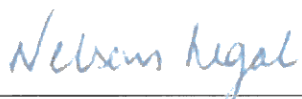
Respondent

(1) BUTLER GROUP LIMITED

(2) CENTRAL PLANNING AUTHORITY

Interested Parties

STATEMENT OF FACTS AND GROUNDS IN SUPPORT OF THE APPLICANT'S
APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

To the Clerk of the Court, Law Courts, George Town, Grand Cayman	
Name, address and description of Applicant	The names and addresses of the Applicants are appended to this document.
Judgment, order, decision or other proceeding in respect of which relief is sought:	The Respondent's decision, dated 8 July 2025, to strike out the Applicants' appeal against the grant of planning permission for development at Block 5D Parcel 4 and Block 5C Parcel 234 and order the Applicants to pay the costs of the Central Planning Authority and the Developer.
Relief sought:	(1) An order quashing the decision under challenge (certiorari). (2) Such further relief as may be needed to give effect to the Court's judgment. (3) Costs.
Name and address of Applicant's attorney	Nelsons Legal The Grand Pavilion 802 West Bay Road Seven Mile Beach Cayman Islands
Signed: 	Dated: 30 th day of September 2025

A. INTRODUCTION AND SUMMARY

1. The Applicants seek leave to apply for judicial review of the decision of the Planning Appeal Tribunal ("**the Tribunal**") to decline to hear the Applicant's appeal against a grant of planning permission for a high-rise development on Seven Mile Beach.
2. The Applicants filed a notice of appeal against the decision of the Central Planning Authority ("**CPA**") in the Tribunal on 4 December 2024, which was within the timeframe stipulated by rule 3 of the Development and Planning (Appeals) Rules ("**the Rules**"). A notice of appeal does not record the grounds of appeal but simply triggers a requirement

for the CPA's Executive Secretary to produce the reasons for the CPA's decision, so that the appellant can formulate the grounds of appeal.

3. The Applicants' attorneys should have served the notice of appeal on Butler Group Limited ("**the Developer**") but omitted to do so. However, (a) the Applicants' attorneys did serve the CPA's Executive Secretary, so as to trigger the production of the reasons for the CPA's decision, and (b) on the same day that the notice of appeal was filed, the CPA notified the Developer that the notice of appeal had been filed.
4. On 30 December 2024, the Executive Secretary served an indexed appeal brief containing the CPA's reasons for the decision under appeal. On 13 January 2025, the Applicants filed and served the grounds of appeal against the CPA's decision. This was done in time, in accordance with rule 5 of the Rules. The Grounds of Appeal were immediately served on the Developer, together with the Notice of Appeal.
5. The Developer alleged that the omission formally to serve him with the Notice of Appeal on 4 December 2024 rendered the appeal void, even though he was aware that the notice had been filed and was served with the Grounds of Appeal on time.
6. On 8 July 2025, following a hearing, the Tribunal (a) agreed with the Developer that the appeal was invalid and (b) refused to extend time for service of the notice of appeal. Although the Tribunal's decision is 58 pages long, its reasoning runs to only two pages. This records that the Tribunal reached two conclusions:
 - 6.1. First, the Tribunal concluded that any delay in serving a notice under rule 3 of the Rules *ipso facto* invalidates an appeal. The Tribunal provided no reasons for rejecting the Applicants' careful submissions that, applying the principle in *R v Soneji* [2006] 1 AC 340 ("**Soneji**"), a breach of a procedural requirement does not *ipso facto* invalidate proceedings if the omission has no impact on the rest of the appeal machinery (here, the preparation of the appeal brief and the in-time filing and service of the grounds of appeal).
 - 6.2. Second, the Tribunal refused to exercise its discretion to extend time for service of the appeal notice on a multi-factor basis, having regard to its composite assessment

that (a) there was no justification for the delay, (b) the appeal has no realistic prospect of success, and (c) the Developer had been prejudiced. The Tribunal's view that there was no realistic prospect of success was an inextricable part of its composite reasons for refusing to exercise its discretion to extend time. However, the Tribunal gave no reasons at all for concluding that the grounds of appeal had no realistic prospect of success.

7. On 21 July 2025, the Applicants issued an appeal in this Court against the Tribunal's decision under section 48(4) of the Development and Planning Act. In response, the Respondent and Developer contended that, since the Tribunal had declined to hear the appeal, its decision could only be challenged by way of judicial review. The Applicants are content to proceed on that basis and, accordingly, file this application for leave to apply for judicial review. They have done so within the period provided by rule 4 of Order 53 of the Grand Court Rules.

8. The Applicants advance two grounds for judicial review:

8.1. Ground 1: on a *Soneji* analysis, a failure to serve a notice of appeal under rule 3 of the Development and Planning Regulations does not *ipso facto* invalidate an appeal. The Tribunal's unreasoned conclusion to the contrary was wrong in law.

8.2. Ground 2: the Tribunal's refusal to extend time was flawed. In particular, it failed to give any reasons for concluding that none of the grounds of appeal had any realistic prospect of success and/or it was wrong in law to conclude that they had no prospect of success. It also miscalculated the delay in serving the Notice of Appeal and failed to give adequate reasons for concluding that the Developer was prejudiced even though he knew from the outset that the appeal had been lodged.

9. The requirement for leave to apply for judicial review is "*no more than a filter to weed out groundless cases*" (*Knibbs v Revenue Customs Commissioners* [2020] 1 WLR 731, para 25) designed to "*protect public bodies against weak and vexatious claims*" (*R v Secretary of State for Trade & Industry ex p Eastaway* [2000] 1 WLR 2222, 2227H, *per* Lord Bingham). This application is plainly not groundless or apt to summary disposal and, accordingly, leave to apply for judicial review should be granted.

10. As set out at section D.1 below, the Applicants seek an interim stay of the CPA's decision to grant planning permission, in order to hold the ring pending the final determination of these proceedings. This is provided for by rule 3(10) of the Grand Court Rules.

B. GROUND 1: SONEJI

B.1 The Soneji principle

11. The *Soneji* principle was articulated in *R v Soneji* [2006] 1 AC 340. The House of Lords considered whether the failure of a criminal court to make a confiscation order within the period prescribed by the legislation rendered the confiscation order invalid. Lord Steyn explained that "*A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply*" (para 14). In such cases, a flexible approach is required, and "*the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity*" and this "*is ultimately a question of statutory construction*" (para 23). On the facts of that case, the House of Lords held that, although Parliament required a confiscation order to be made within the prescribed time limit, a failure to do so did not render the order invalid.
12. The UK Supreme Court applied the *Soneji* principle in *AI Properties v Tudor Studios* [2025] AC 1075. Legislation required that tenants who wished to obtain the right to manage a block of flats were required to serve a notice on each landlord under the lease, but the tenants in question had failed to serve the intermediate landlord. The legislation did not expressly state the consequences of the failure to serve the notice. The Supreme Court held that "*In our view the correct approach in a case where there is no express statement of the consequences of non-compliance with a statutory requirement is first to look carefully at the whole of the structure within which the requirement arises and ask what consequences of non-compliance best fits the structure as a whole*" (para 68). Applying that approach to the statutory scheme in issue, the Supreme Court concluded that the failure to serve the notice rendered the right to manage voidable rather than void (para 85). Whether the procedure should be voided in a particular case would depend on whether the landlord had

been afforded the right to participate in tribunal proceedings. If he had been afforded that opportunity, then his complaint would be “*purely procedural*” and the Court would not intervene (para 85). The Supreme Court decided that Parliament could not have intended that the person affected by the procedural omission “*should acquire, by a windfall, a power to thwart the operation of the statutory process which it would not otherwise have enjoyed*” but for the failure to serve the notice (para 92). “*The procedural requirements have not been included to create traps for the unwary, nor to afford unwarranted opportunities for obstruction on the part of the objecting landlords*” (para 98). The Supreme Court held that “*the legal question*” is whether what was done by the tenants “*was a sufficient foundation for the commencement of the statutory procedure*” (para 94).

13. Thus, the UK Supreme Court has held that, where there is no express statement of the consequences of non-compliance, one must examine the structure of the legislation and ask what consequences of non-compliance best fit that structure. In *Belvedere Court Management Ltd v Frogmore Developments Ltd* [1997] QB 858 (a pre-*Soneji* judgment), the Court of Appeal of England and Wales took a similar approach. At p886, Hobhouse LJ held that: “*legislation of the present kind should be evaluated and construed on an analytical basis. It should be considered which of the provisions are substantive and which are secondary, that is, simply part of the machinery of the legislation. Further, the provisions which fall into the latter category should be examined to assess whether they are essential parts of the mechanics or merely supportive of the other provisions so that they need not be insisted on regardless of the circumstances.*”

14. Section 9.5 of Bennion on Statutory Interpretation encapsulates the principle as follows:

“*Effect of failure to comply with statutory requirements:*

(1) *Where an Act imposes a procedural or other requirement in connection with the doing of anything under the Act but does not spell out the consequences of breach, the question arises whether a failure to comply invalidates the thing done.*

(2) *In ascertaining the effect of a failure to comply, it is necessary to determine whether the legislature can fairly be taken to have intended non-compliance to result in total invalidity.*”

15. The *Soneji* principle has been recognized as applying in the Cayman Islands, for example: *R (Infinity Broadband Ltd) v Utility Regulation and Competition Office* [2025] CICG (Civ) 25.

B.2 The Development and Planning (Appeals) Rules and the extent to which they were complied with

16. Section 48(1) of the Development and Planning Act provides that:

“Any person who has applied for planning permission, or who has objected to an application for planning permission after being notified of the application in accordance with regulations made under this Act, and who is aggrieved by a decision of the Authority in respect of the application, may, within fourteen days of notification of that decision under section 40, or within such longer period as the Tribunal may in any particular case allow for good cause, appeal against that decision to the Tribunal [on specified ground]”.

17. Thus:

- (1) There is a 14-day statutory time limit for filing an appeal.
- (2) If the appeal is not filed in time, the Tribunal is empowered to extend time.
- (3) Taken together, points 1 and 2 indicate that the validity of the appeal depends on either filing within time or filing within such extended period as the Tribunal allows.
- (4) The statute itself does not require the notice of appeal to be served. Accordingly, the statute does not suggest that the validity of the appeal depends on serving the notice of appeal at all or within a particular timeframe.

18. Section 48(1) goes on to state that an *“appeal shall be heard and determined based on the record of the hearing to which it relates in accordance with any rules made hereunder”*. Thus, the Act requires the appeal to proceed on the basis of a record of the hearing and contemplates that the machinery for this will be set out in rules. As identified below, the

record of hearing is the bundle prepared by the Permanent Secretary and served by the Permanent Secretary on all persons, including the developer.

19. Section 48(6) provides: “*The Chief Justice shall make rules for the better carrying out of this section, for the procedure and forms to be used for the admission of evidence and fees to be paid on any appeal under this Act*”. The Act does not specify any consequences for non-compliance with the rules.

20. The Chief Justice made such rules in 1985. They were republished in 1999. They have never been scrutinized by Parliament. Unlike rules of court which govern the judicial process, the Development and Planning (Appeals) Rules relate to an administrative process before an administrative tribunal.

21. Rule 3 of the Rules provides:

“An appeal to the Tribunal under section 45(1) shall be made by notice in writing, hereinafter referred to as a ‘Notice of Appeal’, signed by the appellant or his attorney-at-law. The Notice of Appeal shall be filed in the office of the Permanent Secretary within the period of ten days stipulated in the above mentioned subsection and immediately thereafter a copy thereof shall be served by the appellant upon the executive secretary and upon all parties who may have filed objections or been heard at the hearing of the application to which the appeal relates.”

22. Rule 3 is out of date in that appeals to the Tribunal are brought under section 48(1) of the Development and Planning Act (not section 45(1) as stated in rule 3) and the statutory time limit under section 48(1) is 14 days (not 10 days as stated in rule 3).

23. Under rule 3:

(1) The Appellant must file the Notice of Appeal on the Permanent Secretary within 10 days.

(2) The Notice of Appeal merely records that the appellant appeals against the decision. It cannot identify the grounds of appeal because the CPA’s formal reasons for the decision

will not yet have been provided (see rule 4, below). The grounds of appeal are provided later, under rule 5 (see below).

(3) The Appellant must “*immediately*” (which is not defined) serve the Notice of Appeal on the Executive Secretary and on those who were heard before the CPA. It has to be served on the Executive Secretary to trigger the production of the formal reasons for the decision (see rule 4, below). However, it is only served on other persons for the purposes of information because, at this stage, there is no action for such persons to take in consequence of being served with the Notice of Appeal.

(4) The Rules do not specify any consequences for failing to comply with any of the steps in rule 3.

24. As noted at section A above, the Applicants filed the Notice of Appeal on time, paid the filing fee of \$50 and immediately served it on the Executive Secretary, but overlooked the requirement immediately to serve it on the Developer. However, the Developer was informed by the Planning Department that the Notice of Appeal had been filed on the same day that it was filed. At 10.48am on 4 December 2024, the Planning Officer emailed the developer: “*We received an appeal within the statutory time frame*”.

25. Rule 4 of the Rules provides:

“The executive secretary shall, within fourteen days after service upon him of the Notice of Appeal, prepare and forward to the Permanent Secretary and to the appellant (or his attorney-at-law) an indexed brief containing copies of all documents, correspondence and other papers and exhibits which were presented to the Central Authority on the hearing of the application to which the appeal relates as well as a statement in writing from the Chairman of the Central Planning Authority stating the reasons for its decision.”

26. The Rules do not define “*days*”. The expression therefore takes its meaning from the Development and Planning Act under which the Rules were made (Bennion on Statutory Interpretation, section 18.10) which, at section 2, defines “*days*” to mean “*calendar days unless otherwise specified*”. Section 8 of the Interpretation Act provides that, unless the

contrary intention appears, time runs from the day after the specified event and Sundays and public holidays are treated as excluded days.

27. Thus:

- (1) The Executive Secretary must provide the Permanent Secretary and the appellant with the indexed brief within 14 days of service of the Notice of Appeal.
- (2) The Executive Secretary needs to have been served with the Notice of Appeal under rule 3 to trigger his duty to forward an indexed brief to the appellant and the Permanent Secretary.
- (3) The Executive Secretary's compliance with this rule is essential to enable the appeal to progress because (a) the appellant needs the formal statement of reasons in order to prepare the Grounds of Appeal required under rule 5 (below), and (b) the appeal cannot proceed without the Permanent Secretary's Record of Appeal and the Permanent Secretary cannot prepare the Record of Appeal unless and until he receives the brief from the Executive Secretary (see rule 6, below).
- (4) By contrast, none of the persons required to have been served under rule 3 (other than the Executive Secretary) are required to take any action in response. The progress of the appeal does not in any way depend on them having been served.
- (5) The Rules do not specify any consequences for the Executive Secretary failing to comply with the steps in rule 4.

28. The Executive Secretary breached the time limit specified by rule 4. Applying section 2 of the Development and Planning Act and section 8 of the Interpretation Act, the deadline for him to provide the indexed brief to the Permanent Secretary was 20 December 2024, but he failed to provide it until 30 December 2024. Nobody has suggested that this breach of the statutory time limits in the Rules invalidated the appeal.

29. Rule 5 of the Development and Planning (Appeals) Rules provides:

“(1) The appellant shall, within fourteen days of the service upon him of the brief mentioned in rule 4, file in the office of the Permanent Secretary- (a) the grounds of appeal upon which he intends to rely; and (b) the form or order he seeks.

(2) A copy of the grounds of appeal shall be served by the appellant on all parties to whom the Notice of Appeal has been addressed.”

30. Thus:

(1) The Appellant must file Grounds of Appeal with the Permanent Secretary within 14 days. This is essential to enable the appeal to progress because rule 6 (below) provides that the Grounds of Appeal must form part of the Permanent Secretary’s Record of Appeal.

(2) By contrast, none of the persons required to be served under rule 5 are required to take any action in response. The progress of the appeal does not in any way depend on them having been served. Indeed, the Rules do not prescribe any deadline within which the Appellant must serve the Grounds of Appeal on other parties.

(3) The Development and Planning (Appeals) Rules do not specify any consequences for failing to comply with any of the steps in rule 5.

31. As noted at section A above, the Applicants filed the Grounds of Appeal on time and immediately served them, together with a bundle containing the Notice of Appeal, on the Developer.

32. Rule 6 of the Development and Planning (Appeals) Rules provides:

“(1) The Permanent Secretary shall, upon being satisfied that rules 3, 4 and 5 have been complied with, prepare a Record of Appeal and set down the appeal for hearing by the Tribunal and shall give notice thereof to the chairman of the Tribunal, all members thereof, the appellant, the executive secretary and all persons entitled to be served with the Notice of Appeal.

(2) The Record of Appeal referred to in sub-rule (1) shall comprise the following documents-the Notice of Appeal, the brief prepared under rule 4, the grounds of appeal, the form or order sought and any other document that the Chairman of the Tribunal may direct shall be included therein. The Record shall be bound, or otherwise securely fastened together, and the pages numbered in the order in which they appear therein.

(3) The Permanent Secretary shall give copies of the Record of Appeal to the Chairman of the Tribunal, all members thereof, the appellant and the executive secretary at the same time as the notification under sub-rule (1)."

33. Thus:

(1) The Record of Appeal is the bundle of documents that is needed by the Tribunal to hear the appeal and is needed by all persons wishing to participate in the appeal.

(2) Rule 6 ensures that all interested persons are notified of the appeal. Thus, any omission to serve the Notice of Appeal or Grounds of Appeal on interested persons will be remedied by the Permanent Secretary serving the Record of Appeal.

34. Rule 17 of the Rules provides that "*Time may be extended for good cause shown in the case of appeals to the Tribunal, by the Chairman, and in the case of appeals to the Grand Court, by a judge*". This gives effect to section 48(1) of the Development and Planning Act ("*Any person ...may, within fourteen days of notification of that decision under section 40, or within such longer period as the Tribunal may in any particular case allow for good cause, appeal...*"). Rule 17 does not state that an appeal that has been lodged in time in accordance with section 48(1) of the Development and Planning Act is rendered invalid by a failure to follow any of the procedural requirements in the Rules in the absence of an extension of time.

35. This can be contrasted with the Grand Court Rules. Those rules state that a writ or originating summons "*is valid in the first instance for*" the specified period, but "*the Court may by order extend the validity of the writ*" (Order 6, rule 8). This form of rule expressly states that the consequence of not obtaining an extension of time is that the originating

document is rendered invalid. By contrast, the Development and Planning (Appeals) Rules say nothing to indicate that a delay in service renders an Appeal Notice invalid.

36. On 13 January 2025, the Developer’s attorney objected to the appeal being heard on the grounds of non-compliance with rule 3 of the Rules. On 11 February 2025, the Applicants’ attorney wrote to the Tribunal: *“We do not consider an application for an extension of time to be necessary as all documents were filed within the required timeframes. Mr Jackson complains about the timing of service of the Notice of Appeal. Although I do not consider the application necessary, out of an abundance of caution I attach a [rule] 17 application together with our draft submissions addressing the underlying appeal. These draft submissions are provided to show that our client’s appeal is arguable, being one limb of the test for the granting of an extension of time. I invite you to find that no extension of time is required or, if you find an extension is necessary, to grant [the] same”*.

B.3 Applying the Soneji principle to this case

37. As noted above, neither the Act nor the Rules contain any “*express statement of the consequences of non-compliance*” with any of the Rules. In these circumstances, the UK Supreme Court has held that the court must “*look carefully at the whole of the structure within which the requirement arises and ask what consequences of non-compliance best fits the structure as a whole*” (A1 Properties, para 68). As the Court of Appeal of England and Wales put it, one must consider whether the procedural requirements are essential parts, as opposed to supportive parts, of the statutory machinery (*Frogmore Developments*, p886).

38. Some parts of the planning appeal machinery are clearly essential. As noted above:

- (1) The appeal has to be commenced by filing a Notice of Appeal within the limitation period (section 48(1); rule 3).
- (2) The appeal has to be determined on the record of hearing (section 48(1); rule 6), and in order for the record of hearing to be produced, the Executive Secretary must be served with the Notice of Appeal (rule 3), the Executive Secretary must provide a brief to the Permanent Secretary (rule 4) and the Appellant must file Grounds of Appeal (rule 5).

(3) The rights of interested parties, such as developers, are safeguarded by requiring the Permanent Secretary to give notice that the appeal is being set down for hearing by (rule 6).

39. It may well be that a failure to comply with those requirements would invalidate the appeal in the absence of extension of time. However, all of those requirements were satisfied in this case within the prescribed periods.

40. By contrast, the requirement to serve the Notice of Appeal on a developer (rule 3) and Grounds of Appeal on a developer (rule 5) is not provided for in the Act at all and is not part of the essential machinery of the Rules (albeit rule 5 was fully complied with in this case). This is because the developer will always be served with notice of the proceedings by the Permanent Secretary under rule 6 in any event. There is no risk that a developer will be denied a fair opportunity to oppose the appeal as a result of a failure to serve the Notice of Appeal (rule 3) or the Grounds of Appeal (rule 5). Nevertheless, it may well be that a failure to serve a Notice of Appeal on a developer would render the appeal voidable at the suit of the developer (as opposed to automatically void) if (for example) he has suffered irreparable prejudice through non-service. This was the conclusion reached by the UK Supreme Court in *A1 Properties*. However, there was no such application in this case.

41. The existence of the Tribunal's broad power to extend time under rule 17 does not avoid the need for this interpretative exercise because – as the UK Supreme Court put it in *A1 Properties* – the Rules do not contain any “*express statement of the consequences of non-compliance*” with the service requirement under rule 3. The Rules do not say that a delay in service invalidates the appeal in the absence of an extension of time.

42. There are four further points:

(1) First, the Developer in this case was in fact notified in time by the CPA that a Notice of Appeal had been filed. The Developer did not lose anything by not seeing the Notice of Appeal at that stage, because it contains no information beyond the fact that an appeal is being pursued. The failure to serve under rule 3 therefore had no practical effect.

(2) Second, rule 5 requires the Grounds of Appeal to be served on a developer just as much as rule 3 requires the Notice of Appeal to be served on a developer. However, rule 5

does not specify any time limit for serving the Grounds of Appeal and, accordingly, there is no time limit that is capable of being extended under rule 17. It follows that a delay in serving the Grounds of Appeal could not invalidate an appeal. It would be anomalous to construe the statutory scheme as mandating that a delay in service of the Notice of Appeal invalidates an appeal (absent an extension of time) when a delay in serving the Grounds of Appeal (by however long) could not have that effect.

- (3) Third, if (contrary to the Applicants' submissions) a breach of the requirement to serve third parties under rule 3 renders an appeal void (as opposed to voidable), then one needs to be able to identify the precise moment at which the appeal is rendered void. All participants in the appeal process would need to know the exact moment that the carriage turns into a pumpkin. This would require a period for service measured in units of time. But rule 3 requires service "*immediately*". This does not enable an appellant, or third parties, to know with precision if or when an appeal has become invalid. For example, if an appellant takes 6 hours to post the Appeal Notice, rather than running to the post box, has the appeal become invalid? This again tells against a breach of the requirement resulting in automatic invalidity.
- (4) Fourth, there is a hard-edged time limit within which the Executive Secretary must provide the brief to the Permanent Secretary and that time limit was breached in this case. But there has rightly been no suggestion that this automatically invalidated the appeal. Why is that the case? The reason is that, on a proper interpretation of the statutory framework, the legislator did not intend this to invalidate the appeal. Applying that same exercise of statutory interpretation to rule 3, it can be seen equally that it cannot have been the legislator's intention that a delay in service automatically invalidates an appeal.

B.4 The Tribunal's reasoning

43. The Applicants advanced full submissions to the Tribunal on the application of the *Soneji* principle: see section B of the Applicant's speaking note.

44. The totality of the Tribunal's reasoning on this point was as follows:

“I have concluded that Ms McClymont is wrong in her interpretation of our law. The Rules are clear and the requirements for effecting an appeal are clearly specified. I shall elaborate on this in my conclusions. I shall not go into detail on the case law that Ms McClymont has provided to establish her arguments regarding service of notice as I do not consider her arguments trying to justify why she did not adhere to the Rules with respect to service of appeals to be meritorious”.

Having indicated that the conclusions would elaborate those reasons, the Tribunal’s conclusions simply stated: *“There is no separation in Rule 3 of the Rules between filing and service of the notice of appeal. When appealing a decision one must file the Notice of Appeal and immediately serve the notice on all parties. It is a two-part process and failure to serve renders the Notice invalid”.*

45. The Tribunal’s suggestion that the Applicants were trying to “justify” non-service was inaccurate. The Applicants had not suggested that the Rules should not be adhered to or that they were justified in omitting to serve the notice of appeal. This argument related solely to the legal consequences of the breach of this procedural requirement.
46. The Tribunal did not adequately assess the legal consequences of breaching the rule 3 requirement to serve the Notice of Appeal on third parties. It did not address the key case law. It did not identify the *Soneji* principle. It did not attempt to apply the principle to this statutory scheme.
47. The Tribunal correctly identified that *“When appealing a decision one must file the Notice of Appeal and immediately serve the notice on all parties”*. But that was common ground and should have been the starting point for the analysis. The question, as in *Soneji* and *AI Properties*, was: what are the consequences of non-compliance? That was a question of statutory interpretation.
48. The Tribunal failed to make any attempt to interpret what the legislator intended the consequences to be of non-compliance with the requirement to serve third parties. It simply moved from the (accepted) position that the Rules require the Notice to be served immediately to the conclusion that a breach of this requirement renders the Notice “invalid”.

49. If the Tribunal had done what the UK Supreme Court had identified was required (“*look carefully at the whole of the structure within which the requirement arises and ask what consequences of non-compliance best fits the structure as a whole*”), it would have appreciated that service of the Notice of Appeal on third parties is not part of the essential machinery of the appeal process because it has no legal consequences, given that there is no consequential action that depends on the Notice of Appeal being served at that stage. It is the Record of Appeal that triggers the involvement of third parties (if they wish to be involved) and they are notified of the Record of Appeal by the Permanent Secretary, not the Appellant.

50. As noted above, it may be that, as in *AI Properties*, the Developer could have applied to have the appeal voided for non-service, but there was no such application in this case and, in any event, such an application would have been impossible given that the Developer at all times knew that the Notice of Appeal had been filed in time.¹

51. For the purposes of this leave application, it is (at least) arguable that the Tribunal erred in (a) failing to conduct the exercise in statutory construction required under the *Soneji* principle and (b) was wrong to conclude that, absent an extension of time, any delay in serving an Appeal Notice automatically invalidates an appeal.

C. GROUND 2 – FLAWED ASSESSMENT OF THE APPLICATION TO EXTEND TIME

52. The Tribunal only needed to consider the application to extend time because it had concluded that a delay in serving a Notice of Appeal under rule 3 otherwise rendered it invalid. Thus, if this claim for judicial review succeeds on ground 1, it will be unnecessary for the Grand Court to consider ground 2.

¹ The Tribunal’s conclusion (in the context of the application to extend time, not the *Soneji* issue) that the Developer had been prejudiced is no answer to this because this conclusion presupposed that the appeal was void (as opposed to voidable). So, the Tribunal appears to have reasoned, the Developer was entitled to treat the appeal as void, even though he knew that the Appeal Notice had been filed in time. This seems to be what the Tribunal meant when it stated, somewhat cryptically, that “*the appeal had not been perfected*” (para 8 of the Conclusions of the Chairman). If a failure to serve the Notice of Appeal rendered the appeal voidable (as opposed to void), then the Tribunal could not have reached that conclusion.

C.1 The Tribunal's composite approach

53. The Tribunal recorded authorities for the proposition that an assessment of whether to extend time requires all relevant factors to be considered in combination and that the absence of good reason for delay is not a sufficient reason to refuse to extend time: paragraph D10. The Tribunal did not question that proposition and proceeded to consider a number of factors in combination: the absence of reason for the omission, the length of the delay, the merits of the appeal, and prejudice to the Developer. The Tribunal did not conclude that any of those factors in isolation would have led it to refuse the application to extend time. Given that the Tribunal took an indivisible composite approach, it follows that if the Tribunal erred in its assessment of any of those factors, then its decision as whole cannot stand.

54. Thus, to succeed on judicial review ground 2, the Applicants only need to succeed on one of the submissions set out at sections C.2, C.3, C.4, C.5, C.6 or C.7 below. If the Court finds there to be one or much such errors in the Tribunal's decision to refuse to extend time, then the decision should be quashed and remitted to the Tribunal.

C.2 The Tribunal's inadequate reasons for concluding no realistic prospect of success

55. The Applicants had advanced five grounds of appeal, supported by detailed submissions. The Developer had responded in detail to those submissions. How did the Tribunal resolve those detailed competing submissions? All it said was as follows:

“Nothing in the present arguments advanced by the Appellant suggest that there is a realistic prospect or likelihood of success if the extension-and later leave to appeal- is granted. All of the arguments had already been presented to the Authority and considered. Notwithstanding the objections presented to the Authority, it nevertheless resolved to grant planning permission for the development subject to the stated conditions in the Reasons for the Decision.”

56. Those reasons were manifestly inadequate. The Applicants had presented detailed legal grounds of challenge. For example, as set out at section C.3 below, ground 1 of appeal concerned the proper interpretation of “*non-habitable space*” in regulation 8(4) of the Development and Planning Regulations. Did the Tribunal attempt to interpret the Regulations? If so, why did it think that the Applicants’ interpretation had no realistic prospect of success? The Tribunal’s decision contained no explanation at all. The only point the Tribunal made was that the CPA had already considered the issues, but the views of the CPA could not determine the prospects of success of this ground because it turns on a question of statutory interpretation, not planning judgement.
57. As the Court of Appeal of England and Wales has explained in the respect of the duty to give reasons for judicial decisions: “*The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in Ex parte Dave) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not*” (*Flannery v Halifax Estate Agencies* [2000] 1 WLR 377, 381).
58. This case concerns a decision by an administrative tribunal rather than a court, but the same reasoning applies (as noted by the Court of Appeal of England and Wales in *Dunster Properties Ltd v First Secretary of State* [2007] 2 P & CR 26).
59. The Tribunal’s reasons were inadequate because the decision leaves the Applicants with absolutely no idea why the Tribunal thought that none of the five grounds of appeal had any realistic prospect of success. Given that the Tribunal’s conclusion on prospects of success formed an inextricable part of its decision on extending time, it follows that the decision cannot stand.
60. That is enough to resolve the case. However, further or alternatively, each of the grounds of appeal before the Tribunal plainly do have (at the very least) a real prospect of success.

In particular, the Applicants submit that Appeal Grounds 1, 2 and 5 plainly have a realistic prospect of success, for the reasons set out below.

C.3 Appeal ground 1 has a realistic prospect of success

61. Regulation 8(2)(e)(i) of the Development and Planning Regulations provides that: *“when the building is a hotel or apartment in Hotel/Tourism zone 1 or in Hotel/Tourism zone 2, the maximum permitted height is one hundred and thirty feet or ten storeys, whichever is less”*.

62. Regulation 2 defines “storey” as *“that portion of a building included between the surface of any floor and the surface of the floor next above it or if there be no floor above it, then the space between such floor and the ceiling next above it”*.

63. Regulation 8(4) and 8(4A) identify exemptions from that ten-storey limit:

“(4) Paragraph (2) does not apply to any chimney, storey below grade, church spire, dome, cupola, stage tower, water cooling tower, elevated water storage tank, elevator tower, radio or television antenna tower, smokestack, parapet wall or structure of a like nature, non-habitable ancillary spaces, and any necessary mechanical appurtenances thereof:

Provided that —

(a) in Grand Cayman the maximum permitted height of any such structure and appurtenance, if any, shall not exceed the height limitation prescribed by the Director of Civil Aviation within the flight approach zone pattern of the Owen Roberts International Airport; and

(b) in the case of a radio or television antenna tower or structure of a like nature where the structural stability of the tower or structure is reliant upon guys, it shall not be erected on any lot nearer to any of the boundaries of that lot than a distance less than the height of such structure or appurtenance.

(4A) Notwithstanding paragraph (2), the maximum permitted height of a building in the zones specified in paragraph (2)(a), (c), (e) and (f) may be increased, upon application, at the discretion of the Authority by no more than one storey for the purpose of the erection of a structure on the roof of a building where the structure will be —

(a) for the common use areas and public use areas of the building; and

(b) to enhance the primary use of the building,

and the following conditions shall apply —

- (i) no more than one application shall be made under this regulation;
- (ii) if covered by a roof, the square footage of the structure shall not be greater than seventy per cent of the square footage of the storey immediately below the roof;
- (iii) the height of the structure shall not exceed any limit in height as may be prescribed by the Cayman Islands Airports Authority with regard to the flight approach zone patterns of an airport, whichever is the lesser of the two;
- (iv) the floor to ceiling height of the structure shall not exceed ten feet;
- (v) the provisions of paragraph (4) shall not apply so as to permit the placement of any structure or appurtenance on the roof of the structure;
- (vi) written notice shall be given to adjacent landowners in respect of the proposed use; and
- (vii) the structure shall comply with the *Building Code Regulations (2022 Revision)*.”

64. Thus, in broad terms, regulation 8(4) provides an exemption for things like chimneys and antennas, and regulation 8(4A) allows a developer to apply for an exemption for a roof structure for “*common use areas and public use areas*”.

65. The development in question is 11 storeys. As explained at paragraph 7 of the CPA’s reasons for granting planning permission, and as the plans show, the 11th storey is for common use areas: swimming pools and common use restrooms. There is no ceiling over the swimming pools such that they do not come within the definition of “*storey*” in regulation 2. However, there is a ceiling above the common use restrooms, so planning permission could not be granted unless the Developer could bring the 11th storey within the regulation 8(4)-(4A) exemptions.

66. The Developer was unable to make use of the “*common use areas*” provision under regulation 8(4A) because, contrary to regulation 8(4A)(b)(iv), the floor to ceiling height of the proposed 11th storey exceeds ten feet. The only remaining line of argument for the Developer was to contend that the 11th storey comprises “*non-habitable ancillary space*” within the meaning of regulation 8(4). The CPA accepted that argument.

67. Appeal ground 1 is that the CPA misinterpreted the meaning of “*non-habitable ancillary space*”, as that expression is used in regulation 8 of the Development and Planning Regulations. In summary:

(1) The restrooms are unquestionably “*common use areas*”. They are for the common use of residents and their guests when using the 11th storey pools and amenity space. It is regulation 8(4A) that governs “*common use areas*”. If the concept of “*non-habitable ancillary space*” already covered “*common use areas*”, then regulation 8(4A) would not have been enacted because regulation 8(4) would already have exempted such areas. As explained at section 21.2 of Bennion on Statutory Interpretation: “*Given the presumption that the legislature does nothing in vain, the court must endeavour to give significance to every word of an enactment*”. Thus, “*non-habitable ancillary space*” cannot be interpreted as embracing “*common use areas*” like communal restrooms. It follows that the 11th storey could not be exempted under regulation 8(4) and the CPA erred in law.

(2) This interpretation is consistent with the list in which “*non-habitable ancillary space*” is included in regulation 8(4). It is part of a list of spaces that are not used by people, such as water storage tanks, radio towers, and smokestacks. Applying the *ejusdem generis* principle, this is a further indication that “*non-habitable ancillary space*” does not embrace “*common use areas*” like communal restrooms.

(3) This reading makes obvious good sense. To read “*non-habitable ancillary space*” as embracing “*common use areas*” like communal restrooms would transform regulation 8(4) from being a narrow carve-out for ancillary things like water storage tanks into a general licence to build multiple storeys providing key facilities to residents, such as gyms, cinemas, covered swimming pools and changing rooms. That is fundamentally incompatible with the careful, narrow approach taken in regulation 8 as a whole and regulation 8(4A) in particular.

68. The only counterargument advanced by the Developer was that bathrooms do not count as “*habitable space*” for the purposes of the International Building Code 2009, which has been adopted in the Cayman Islands. The Developer contends that, if bathrooms are excluded from “*habitable space*” under the Building Code, then they must be included in the meaning of “*non-habitable ancillary space*” in the Planning Regulations. However:

(1) The surest guide to the meaning of the Development and Planning Regulations is the language and structure of the Regulations. As the UK Supreme Court explained in *R*

(Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department [2023] AC 255, paras 29-30: “Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained ...External aids to interpretation therefore must play a secondary role...”. As set out above, read in the context of regulations 8(4) and 8(4A), it is plain that the term “*non-habitable ancillary space*” does not exclude storeys containing common use areas such as changing rooms and restrooms from being exempted from the 10-storey limit on development. That cannot be displaced by the International Building Code 2009 which, at best, is an external aid to construction and could only play a secondary role in interpreting the Development and Planning Regulations.

- (2) The Development and Planning Regulations have referred to the concept of habitable space since 1972 (section B of the 1972 Regulations provided that “*No dwelling house shall exceed two habitable storeys*”). The concept must bear the same meaning in the 2018 Revision as it has done since 1972. A Building Code drafted in 2009 cannot retrospectively change the meaning of the concept of habitable space in the Development and Planning Regulations.
- (3) The Building Code performs a different function to the Planning Regulations. The Building Code is concerned with internal design standards, and whether a room is classed as habitable space is relevant for the purposes of determining (for example) minimum light, ventilation and fire safety standards. By contrast, the Planning Regulations are concerned with land use planning, including the impact of buildings on their surroundings and the visual amenity of an area. For that purpose, what matters is how a building looks rather than how a particular room is used. Accordingly, there is no reason to suppose that the drafter of the Planning Regulations intended “*non-habitable ancillary space*” to be read by reference to the term “*habitable space*” in the Building Code.

(4) If the drafter of the Development and Planning Regulations had intended to adopt the approach to habitability in the Building Code, he could easily have said so. However, there is no such provision and, given that planning legislation and building legislation deal with separate subject matters, this is entirely unsurprising.

69. This appeal ground has a realistic prospect of success and the Tribunal was wrong to conclude otherwise. For the purposes of this leave application, the Applicants only need to show that it is arguable that Appeal Ground 1 has a realistic prospect of success. That threshold (that it is *arguable* that it is *realistic*) is a low one.

C.4 Appeal ground 2 has a realistic prospect of success

70. Section 13(1) of the Development and Planning Act provides: “*Except where otherwise provided for by this Act, permission shall not be given which would result in a development at variance with a development plan*”.

71. Paragraph 3.04 of the Development Plan provides: “*The Authority shall take into consideration the characteristics of the form of tourist accommodation proposed and shall be satisfied that the layout, scale and massing of development are compatible with the ecological, aesthetics, and other physical characteristics of the site; and that a high quality of design and landscaping are used*”.

72. As the UK Supreme Court has explained, a development plan must be “*interpreted objectively in accordance with the language used, read as always in its proper context*” and its proper meaning is therefore a question of construction for the Court (*Tesco Stores v Dundee City Council* [2012] PTSR 983, para 18).

73. As noted above, paragraph 3.04 of the Development Plan requires the CPA to assess whether the layout, scale and massing of development is compatible with the “*characteristics of the site*”. The only sensible reading of this is that the “*characteristics of the site*” includes its surroundings. For example, the characteristics of this site include that it is next to Seven Mile Beach. Indeed, it would be a very poor development plan that failed to make provision for the consideration of the impact of a development on its surroundings.

74. The Developer argued for a different interpretation of the Development Plan. It contended that, so long as the maximum limits in the Development and Planning Regulations are satisfied, the CPA cannot assess the impact of the proposed development on its surroundings. It relied on a previous decision of the Tribunal, *Libanon Corporation v CPA*, in which the Tribunal (with the same Chair presiding) held that, for the purposes of paragraph 3.04 of the Development Plan, “*characteristics of the ‘site’ ...is confined to the lot itself*” (para 13). For the reasons set out above, the Applicants submit that this based on a misinterpretation of the Development Plan and was therefore wrong in law.
75. However, the CPA accepted the Developer’s submissions. It decided that: “*The proposed development does not represent over-development of the site as it complies with all minimum required setbacks, the maximum allowable site coverage and the maximum allowable building height*”. The words “*as it*” indicate that the CPA accepted the Developer’s submission that compliance with the maximum limits in the Development and Planning Regulations were dispositive of the Development Plan question of whether “*the layout, scale and massing of development are compatible with the ecological, aesthetics, and other physical characteristics of the site*”. The CPA therefore erred in the same way that the Tribunal erred in the *Libanon Corporation* case. This is the error identified in appeal ground 2(a).
76. The consequence of that error is that the CPA wrongly refused to consider the impact of the proposed development on neighboring properties. This was particularly significant given that, in her memorandum of 30 July 2024, the Director of Environment had stated on behalf of the National Conservation Council: “*It is highly likely that the construction of the proposed development will lead to overshadowing and blocking of daylight / sunlight from the southernmost units at Silver Sands, and from a significant portion of The Palms. As such we recommend that the CPA give due holistic consideration to the visual impacts and the impacts of daylight, sunlight and overshadowing, both at a development-specific scale and more generally as part of development planning for the islands*”. The CPA did not do so because it wrongly treated compliance with the Regulations as dispositive of the question of whether the height, scale and massing of the proposed development was appropriate at this location.

77. There was a further flaw in the CPA's reasoning. Section 10(1) of the Development and Planning Act requires the CPA to submit to Parliament proposed updates to the Development Plan at least every 5 years. In breach of that requirement, the CPA has failed to submit any updates to Parliament since 1997. However, it has now prepared a draft Final Planning Framework. Although it is still subject to Parliamentary approval, the draft Final Planning Framework represents the CPA's up-to-date assessment of appropriate planning considerations. The Applicants asked the CPA to have regard to that draft Final Planning Framework when deciding whether to grant planning permission. The CPA refused to do so, holding at paragraph 8(h) of its decision that "*Any reference to the draft Final National Planning Framework is irrelevant as that policy document has no legal standing because it has not been approved in Parliament*". The CPA's refusal to consider the document on the ground of irrelevancy was wrong in law. The Development and Planning Act is modelled on UK planning legislation and the CPA's power to grant planning permission is closely analogous to the power of local authorities to grant planning permission in the UK. In the UK, it is well established that draft plans are not irrelevant, and can be taken into account as material considerations: see section P70.09 of the Planning Encyclopaedia. This is for the obvious reason that a planning authority's up-to-date published views on planning considerations are relevant to the exercise of its broad statutory power to grant or refuse planning permission under section 15(1) of the Act. This is the error identified in appeal ground 2(b).

78. This appeal ground has a realistic prospect of success and the Tribunal was wrong to conclude otherwise. Again, for the purposes of this leave application, the Applicants only need to satisfy the low threshold that it is arguable that Appeal Ground 2 has a realistic prospect of success.

C.5 Appeal ground 5 has a realistic prospect of success

79. Section 41(4)-(5) of the National Conservation Act provides:

"(4) Every entity, except Cabinet, in accordance with any guidance notes issued by the [National Conservation] 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.

(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.”

80. In *Central Planning Authority v National Conservation Council* [2023] 2 CILR 309, paragraphs 35-36, the Court of Appeal held:

“35. ...Section 41(5)(b) requires the NCC to direct refusal of planning permission where the NCC considers that the adverse impact of the proposed grant of planning permission cannot satisfactorily be mitigated by conditions. This provision is of significance in two respects. First, the statute draws a distinction between the proposed action under subs (4) (see the opening words to subs (5)) and mitigation by conditions. This demonstrates that adverse impact of the proposed action means adverse impact foreseen without consideration of any suggested conditions. The concept of adverse effect in subs (3) and (4) must be the same as the adverse impact to which subs (5)(b) refers.

36. Second, it is plain that the power to consider and decide the extent to which conditions mitigate adverse effect or impact is conferred on the NCC. Similarly, in a case where the CPA does not consider that conditions are necessary, the NCC has the power to direct that permission should only be given subject to conditions under subs (5)(a).”

81. Thus, if the NCC directs that permission should only be given subject to certain specified conditions, then the CPA is prohibited from granting planning permission in the absence of those conditions. The CPA’s statutory duty is to impose the NCC’s conditions, not

something approximating to the NCC's conditions. The following chronology shows that the CPA failed to comply with that statutory duty.

82. On 12 September 2024, the CPA sought approval from the NCC under section 41(4) of the National Conservation Act to grant planning permission to the Developer.

83. The NCC responded in the following terms:

“Under Section 41 (5) of the NCA, in the exercise of powers which have been conferred through express delegation by the National Conservation Council, pursuant to section 3(13) of the National Conservation Act (2013) the Director of DoE, therefore, respectfully directs that the following conditions be imposed by the Central Planning Authority or Department of Planning, as part of any agreed proposed action for planning approval...”.

84. The directed conditions included:

- (1) “Turtle-friendly lighting” condition: *“Prior to the issuance of a Building Permit, the applicant shall prepare and submit a plan for review and approval to the Department of Environment for turtle friendly lighting, which minimises the impacts on sea turtles.”*
- (2) “Turtle-friendly construction fencing” condition: *“Prior to the issuance of a Building Permit, beachside construction fencing associated with the works shall be installed and be positioned 75 from the Mean High Water Mark. The fencing shall be erected so that it fully encloses the beach-facing area of works and is embedded at least 2 feet into the beach profile to prevent turtles from entering the construction site or digging under the fencing. The applicant shall liaise directly with the Department of Environment for requirements guidance regarding this fencing. The Department of Environment will inspect the fencing and confirmation of the Department of Environment's written approval must be received by the Planning Department prior to the issuance of the Building Permit.”*
- (3) “Beach quality sand” condition: *“The void remaining following demolition, and removal of the existing pool shall be filled with site-derived beach quality sand; Any*

sand that is to be excavated during construction shall be retained on-site and beach quality sand shall be placed along the active beach profile”.

85. As noted above, the CPA was under a legal duty not to grant planning permission without imposing the conditions directed by the NCC. The CPA breached that duty because, although it imposed conditions that were similar to those directed by the NCC, they were materially different:

- (1) “Turtle-friendly construction fencing” condition. Instead of the condition directed by the NCC, the CPA imposed the following condition: *“beach side construction fencing associated with the works shall be positioned at the minimum required high water mark setback, or greater if feasible (to minimise impacts on the turtle nesting habitat) and the fencing shall be erected so that it fully encloses the beach facing area or works and is embedded at least 2 feet into the beach profile: to prevent turtles entering the construction site or digging under the fencing, during nesting season. The applicant is directed to liaise with the Department of Environment regarding guidance notes for the appropriate type or fencing”*. Whereas the NCC had directed that the fencing had to be inspected and approved by the Department of Environment (*i.e.* the body with the relevant conservation expertise), the CPA’s condition made no provision at all for inspection and approval.
- (2) “Turtle-friendly lighting” condition. Instead of the condition directed by the NCC, the CPA imposed the following condition: *“The applicant shall submit a plan for turtle friendly lighting which minimizes impacts on sea turtles and is prepared in accordance with the Department of Environment’s guidelines and approved by the Central Planning Authority”* and *“If a turtle lighting plan has been required, confirmation from the Department of Environment that the installed lighting complies with the plan, with final confirmation provided by the Authority or delegate”*. Whereas the NCC had directed that the lighting plan had to be approved by the Department of Environment (*i.e.* the body with the relevant conservation expertise), the CPA’s condition made the CPA responsible for approval of the plan (when the CPA does not have equivalent conservation expertise). The CPA’s condition only provided for the Department of Environment to confirm whether the lighting complied with the plan approved by the CPA.

- (3) “Beach quality sand” condition. Instead of the condition directed by the NCC, the CPA imposed the following condition: *“Any sand that is excavated during construction shall be retained on-site and only with the prior consultation and approval of the DOE will beach quality sand shall be placed along the active beach profile. If there is an excessive quantity of sand that cannot be accommodated on-site, and the applicant would like to move such sand offsite, it shall be the subject to a separate application for planning permission and separate consultation with the National Conservation Council”*. Whereas the NCC had directed that the void following demolition had to be filled with site-derived beach quality sand, the CPA’s conditions made no such provision.

86. In *National Conservation Council v Central Planning Authority* [2025] CIGC (Civ) 6, the Grand Court held that the NCC had again breached section 41 of the National Conservation Act. Accordingly, this is now the second time that the CPA has failed to comply with the Court of Appeal’s definitive guidance on the operation of section 41 of the National Conservation Act.

87. Before the Tribunal, the Developer submitted that the CPA had included the conditions directed by the NCC (paragraph F45). However, as set out above, that was plainly incorrect.

88. This appeal ground has a realistic prospect of success and the Tribunal was wrong to conclude otherwise. Again, for the purposes of this leave application, the Applicants only need to satisfy the low threshold that it is arguable that Appeal Ground 5 has a realistic prospect of success.

C.6 The Tribunal’s calculation of the delay

89. At paragraph 3 of its conclusions, the Tribunal recorded that the delay in service was 42 days. This was wrong in law. If the requirement for immediate service under rule 3 meant that the appeal was a nullity unless the Appeal Notice was served on the Developer on 4 December 2024, then the delay until 13 January 2025 adds up to 31 days. This is because, under section 2 of the Development and Planning Act and section 8 of the Interpretation Act (see paragraph 27 above), Sundays and public holidays do not count.

90. The Tribunal also failed to recognize that part of the delay was caused by the Executive Director's breach of the statutory time limits. Had the Executive Director served the indexed brief on the Applicants on time, the bundle containing the Grounds of Appeal and Notice of Appeal would have been served on the Developer earlier.

C.7 The Tribunal's flawed assessment of prejudice

91. The Developer accepted that he had received email confirmation from the Planning Department on 4 December 2024 that an in-time appeal had been filed. Nevertheless, he contended that he was "*potentially*" prejudiced by the delay in formally being served with the Notice of Appeal. As recorded at paragraph F46 (under the heading "potential prejudice") the Developer set out certain costs associated with the development incurred from 3 December 2024. However, the Developer rightly did not suggest that he would not have incurred those costs if he had been served with the Notice of Appeal.

92. As recorded at paragraphs D11-14 of the Tribunal's decision, the Applicants submitted to the Tribunal that the delay in service had not caused any delay to the Developer because:

- (1) There was no evidence that the Developer would not have taken the identified steps if he had been formally served with the Notice of Appeal (as opposed to being told that the Notice of Appeal had been filed).
- (2) The Developer's own figures showed that his decision to incur costs on the development had nothing to do with service of the Notice of Appeal. He spent \$150,000 on architectural and design fees on 3 December 2024, which was the day before the deadline for appealing against the CPA's decision, which shows that he intended to proceed with the development regardless of the risk that the permission would be overturned on appeal. He also continued to enter into contracts after he was served with the Notice of Appeal on 13 January 2025.
- (3) The Developer's submissions did not address the Applicant's submission that the delay in service had not caused him any prejudice.

93. How did the Tribunal resolve this issue? The totality of its reasoning was as follows:

“The fact that the Developer was not served with the Notice of Appeal when it was filed obviously led the Developer into believing that the appeal had not been perfected despite the knowledge of the filing gleaned from the Department of Planning. The appeal had not been perfected, and the Developer had proceeded accordingly, under the belief that the planning approval was unchallenged. I find that in exercising my discretion to extend time for filing would be prejudicial to the Developer who could not be compensated in costs and accordingly, accept the arguments of the Second Respondent concerning prejudice, save that the estimate of costs remain unsubstantiated.”

94. That reasoning was flawed because:

- (1) The question was whether the procedural omission had caused the Developer any prejudice, rather than whether a successful appeal would prejudice the Developer. In stating that *“the Developer had proceeded accordingly, under the belief that the planning was unchallenged”*, the Tribunal appeared to conclude that the procedural omission had caused prejudice.
- (2) However, as noted above, the timing of the payments made by the Developer indicated that he would have proceeded even if he had been served with the Notice of Appeal which he knew had been filed. The Tribunal was, at the very least, required to confront that submission and assess the evidence. Its reasoning completely failed to do so. This constituted a breach of the requirement of *“process rationality”*, which requires that *“the process of reasoning should contain no logical error or critical gap”* (*R (KP) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] EWHC 370 (Admin), para 56).

C.8 Conclusion on ground 2

95. As noted at section C.1 above, the Applicants only need to succeed on one of the submissions set out at sections C.2, C.3, C.4, C.5, C.6 or C.7 for ground 2 of the claim for judicial review to succeed. They have (at least) an arguable chance of doing so and, accordingly, leave to apply for judicial review should be granted.

D. RELIEF SOUGHT

D.1 Interim relief

96. If this claim and the underlying planning appeal are well-founded, then the CPA's grant of planning permission is unlawful. In those circumstances, if any development had by that stage been carried out, it would be in breach of planning control. As Asif J observed in *National Conservation Council v Central Planning Authority* [2025] CIGC (Civ) 6, para 119, it would be wrong to allow development in breach of planning control to stand.

97. Development has not yet begun. Allowing development to commence, only for the partially completed tower block to be torn down if and when the planning permission is quashed, would not only be economically wasteful but would also risk unnecessary environmental damage to the Seven Mile Beach marine reserve. The balance of convenience therefore very strongly favours maintaining the status quo pending the conclusion of these proceedings. That can be achieved by directing a stay of the CPA's grant of planning permission pending further order or the final determination of the claim.

98. Order 53, rule 3(10) of the Grand Court Rules provides:

“Where leave to apply for judicial review is granted, then –

(a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;

(b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ”.

99. “Proceedings” refers to any decision taken by a public authority (*R v Secretary of State for Education and Science, ex p Avon County Council* [1991] 1 QB 558) and a stay was ordered on the papers in respect of the CPA's grants of planning permission in both *R (National Conservation Council) v Central Planning Authority* (CICA Civil Appeal No 22 of 2022) (the Boggy Sands judicial review) and in the *R (National Conservation Council) v Central Planning Authority* [2025] CIGC (Civ) 6 (the Bon Crepe judicial review).

100. This is a challenge to the refusal of the Tribunal to hear an appeal and, given that the appeal to the Tribunal seeks the quashing of the CPA's grant of planning permission, it is an extension of the challenge to the grant of planning permission. In those circumstances, this Court can direct that the grant of permission shall operate as a stay of the grant of planning permission under rule 3(10)(a). Alternatively, the Court can direct that there shall be a stay of the grant of planning permission under rule 3(10)(b).
101. The effect of staying a decision is to suspend it. As the Court of Appeal of England and Wales noted in *R (H) v Ashworth Hospital Authority* [2003] 1 WLR 127, para.42, this "*preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. ...The Administrative Court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect, or fully carried into effect.*"
102. The balance of convenience favours an interim stay because:
- (1) If an interim stay is directed but the claim fails at trial, the interim stay will have caused minimal prejudice. The development will merely be delayed.
 - (2) If the Tribunal's decision and the planning permission are held to be unlawful then – unless an interim stay is directed – any development carried out in the meantime will be in breach of planning control and will need to be demolished, at significant economic and environmental cost.

D.2 Final relief

103. The Applicants seek an order quashing the Tribunal's decision, such further or other relief as needed to give effect to the Court's judgment, and costs.

E. CONCLUSION

104. For the reasons set out above, the proposed claim for judicial review is arguable and leave to apply for judicial review should therefore be granted.



CAUSE NO.: 254 OF 2025

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

BETWEEN:

THE KING

(On the application of

- (1) THE PROPRIETORS OF STRATA PLAN 148; and
(2) THE PROPRIETORS OF STRATA PLAN 3)

Applicants

-and-

PLANNING APPEALS TRIBUNAL

Respondent

- (1) BUTLER GROUP LIMITED
(2) CENTRAL PLANNING AUTHORITY

Interested Parties

ORIGINATING
APPLICATION FOR
JUDICIAL REVIEW

A. INTRODUCTION AND SUMMARY

1. The Applicants seek judicial review of the decision of the Planning Appeal Tribunal (“**the Tribunal**”) to decline to hear the Applicant’s appeal against a grant of planning permission for a high-rise development on Seven Mile Beach.
2. The Applicants filed a notice of appeal against the decision of the Central Planning Authority (“**CPA**”) in the Tribunal on 4 December 2024, which was within the timeframe stipulated by

rule 3 of the Development and Planning (Appeals) Rules (“**the Rules**”). A notice of appeal does not record the grounds of appeal but simply triggers a requirement for the CPA’s Executive Secretary to produce the reasons for the CPA’s decision, so that the appellant can formulate the grounds of appeal.

3. The Applicants’ attorneys should have served the notice of appeal on Butler Group Limited (“**the Developer**”) but omitted to do so. However, (a) the Applicants’ attorneys did serve the CPA’s Executive Secretary, so as to trigger the production of the reasons for the CPA’s decision, and (b) on the same day that the notice of appeal was filed, the CPA notified the Developer that the notice of appeal had been filed.
4. On 30 December 2024, the Executive Secretary served an indexed appeal brief containing the CPA’s reasons for the decision under appeal. On 13 January 2025, the Applicants filed and served the grounds of appeal against the CPA’s decision. This was done in time, in accordance with rule 5 of the Rules. The Grounds of Appeal were immediately served on the Developer, together with the Notice of Appeal.
5. The Developer alleged that the omission formally to serve him with the Notice of Appeal on 4 December 2024 rendered the appeal void, even though he was aware that the notice had been filed and was served with the Grounds of Appeal on time.
6. On 8 July 2025, following a hearing, the Tribunal (a) agreed with the Developer that the appeal was invalid and (b) refused to extend time for service of the notice of appeal. Although the Tribunal’s decision is 58 pages long, its reasoning runs to only two pages. This records that the Tribunal reached two conclusions:
 - 6.1. First, the Tribunal concluded that any delay in serving a notice under rule 3 of the Rules *ipso facto* invalidates an appeal. The Tribunal provided no reasons for rejecting the Applicants’ careful submissions that, applying the principle in *R v Soneji* [2006] 1 AC 340 (“**Soneji**”), a breach of a procedural requirement does not *ipso facto* invalidate proceedings if the omission has no impact on the rest of the appeal machinery (here, the

preparation of the appeal brief and the in-time filing and service of the grounds of appeal).

- 6.2. Second, the Tribunal refused to exercise its discretion to extend time for service of the appeal notice on a multi-factor basis, having regard to its composite assessment that (a) there was no justification for the delay, (b) the appeal has no realistic prospect of success, and (c) the Developer had been prejudiced. The Tribunal's view that there was no realistic prospect of success was an inextricable part of its composite reasons for refusing to exercise its discretion to extend time. However, the Tribunal gave no reasons at all for concluding that the grounds of appeal had no realistic prospect of success.
7. On 21 July 2025, the Applicants issued an appeal in this Court against the Tribunal's decision under section 48(4) of the Development and Planning Act. In response, the Respondent and Developer contended that, since the Tribunal had declined to hear the appeal, its decision could only be challenged by way of judicial review. The Applicants are content to proceed on that basis and, accordingly, file this application for leave to apply for judicial review. They have done so within the period provided by rule 4 of Order 53 of the Grand Court Rules.
8. The Applicants advance two grounds for judicial review:
 - 8.1. Ground 1: on a *Soneji* analysis, a failure to serve a notice of appeal under rule 3 of the Development and Planning Regulations does not *ipso facto* invalidate an appeal. The Tribunal's unreasoned conclusion to the contrary was wrong in law.
 - 8.2. Ground 2: the Tribunal's refusal to extend time was flawed. In particular, it failed to give any reasons for concluding that none of the grounds of appeal had any realistic prospect of success and/or it was wrong in law to conclude that they had no prospect of success. It also miscalculated the delay in serving the Notice of Appeal and failed to give adequate reasons for concluding that the Developer was prejudiced even though he
• knew from the outset that the appeal had been lodged.

9. The requirement for leave to apply for judicial review is “*no more than a filter to weed out groundless cases*” (*Knibbs v Revenue Customs Commissioners* [2020] 1 WLR 731, para 25) designed to “*protect public bodies against weak and vexatious claims*” (*R v Secretary of State for Trade & Industry ex p Eastaway* [2000] 1 WLR 2222, 2227H, *per* Lord Bingham). This application is plainly not groundless or apt to summary disposal and, accordingly, leave to apply for judicial review should be granted.
10. As set out at section D.1 below, the Applicants seek an interim stay of the CPA’s decision to grant planning permission, in order to hold the ring pending the final determination of these proceedings. This is provided for by rule 3(10) of the Grand Court Rules.

B. GROUND 1: SONEJI

B.1 The Soneji principle

11. The *Soneji* principle was articulated in *R v Soneji* [2006] 1 AC 340. The House of Lords considered whether the failure of a criminal court to make a confiscation order within the period prescribed by the legislation rendered the confiscation order invalid. Lord Steyn explained that “*A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply*” (para 14). In such cases, a flexible approach is required, and “*the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity*” and this “*is ultimately a question of statutory construction*” (para 23). On the facts of that case, the House of Lords held that, although Parliament required a confiscation order to be made within the prescribed time limit, a failure to do so did not render the order invalid.
12. The UK Supreme Court applied the *Soneji* principle in *AI Properties v Tudor Studios* [2025] AC 1075. Legislation required that tenants who wished to obtain the right to manage a block of flats were required to serve a notice on each landlord under the lease, but the tenants in question had failed to serve the intermediate landlord. The legislation did not expressly state

the consequences of the failure to serve the notice. The Supreme Court held that “*In our view the correct approach in a case where there is no express statement of the consequences of non-compliance with a statutory requirement is first to look carefully at the whole of the structure within which the requirement arises and ask what consequences of non-compliance best fits the structure as a whole*” (para 68). Applying that approach to the statutory scheme in issue, the Supreme Court concluded that the failure to serve the notice rendered the right to manage voidable rather than void (para 85). Whether the procedure should be voided in a particular case would depend on whether the landlord had been afforded the right to participate in tribunal proceedings. If he had been afforded that opportunity, then his complaint would be “*purely procedural*” and the Court would not intervene (para 85). The Supreme Court decided that Parliament could not have intended that the person affected by the procedural omission “*should acquire, by a windfall, a power to thwart the operation of the statutory process which it would not otherwise have enjoyed*” but for the failure to serve the notice (para 92). “*The procedural requirements have not been included to create traps for the unwary, nor to afford unwarranted opportunities for obstruction on the part of the objecting landlords*” (para 98). The Supreme Court held that “*the legal question*” is whether what was done by the tenants “*was a sufficient foundation for the commencement of the statutory procedure*” (para 94).

13. Thus, the UK Supreme Court has held that, where there is no express statement of the consequences of non-compliance, one must examine the structure of the legislation and ask what consequences of non-compliance best fit that structure. In *Belvedere Court Management Ltd v Frogmore Developments Ltd* [1997] QB 858 (a pre-*Soneji* judgment), the Court of Appeal of England and Wales took a similar approach. At p886, Hobhouse LJ held that: “*legislation of the present kind should be evaluated and construed on an analytical basis. It should be considered which of the provisions are substantive and which are secondary, that is, simply part of the machinery of the legislation. Further, the provisions which fall into the latter category should be examined to assess whether they are essential parts of the mechanics or merely supportive of the other provisions so that they need not be insisted on regardless of the circumstances.*”

14. Section 9.5 of Bennion on Statutory Interpretation encapsulates the principle as follows:

“Effect of failure to comply with statutory requirements:

(1) Where an Act imposes a procedural or other requirement in connection with the doing of anything under the Act but does not spell out the consequences of breach, the question arises whether a failure to comply invalidates the thing done.

(2) In ascertaining the effect of a failure to comply, it is necessary to determine whether the legislature can fairly be taken to have intended non-compliance to result in total invalidity.”

15. The *Soneji* principle has been recognized as applying in the Cayman Islands, for example: *R (Infinity Broadband Ltd) v Utility Regulation and Competition Office* [2025] CIGC (Civ) 25.

B.2 The Development and Planning (Appeals) Rules and the extent to which they were complied with

16. Section 48(1) of the Development and Planning Act provides that:

“Any person who has applied for planning permission, or who has objected to an application for planning permission after being notified of the application in accordance with regulations made under this Act, and who is aggrieved by a decision of the Authority in respect of the application, may, within fourteen days of notification of that decision under section 40, or within such longer period as the Tribunal may in any particular case allow for good cause, appeal against that decision to the Tribunal [on specified ground]”.

17. Thus:

(1) There is a 14-day statutory time limit for filing an appeal.

(2) If the appeal is not filed in time, the Tribunal is empowered to extend time.

- (3) Taken together, points 1 and 2 indicate that the validity of the appeal depends on either filing within time or filing within such extended period as the Tribunal allows.
- (4) The statute itself does not require the notice of appeal to be served. Accordingly, the statute does not suggest that the validity of the appeal depends on serving the notice of appeal at all or within a particular timeframe.
18. Section 48(1) goes on to state that an *“appeal shall be heard and determined based on the record of the hearing to which it relates in accordance with any rules made hereunder”*. Thus, the Act requires the appeal to proceed on the basis of a record of the hearing and contemplates that the machinery for this will be set out in rules. As identified below, the record of hearing is the bundle prepared by the Permanent Secretary and served by the Permanent Secretary on all persons, including the developer.
19. Section 48(6) provides: *“The Chief Justice shall make rules for the better carrying out of this section, for the procedure and forms to be used for the admission of evidence and fees to be paid on any appeal under this Act”*. The Act does not specify any consequences for non-compliance with the rules.
20. The Chief Justice made such rules in 1985. They were republished in 1999. They have never been scrutinized by Parliament. Unlike rules of court which govern the judicial process, the Development and Planning (Appeals) Rules relate to an administrative process before an administrative tribunal.

21. Rule 3 of the Rules provides:

“An appeal to the Tribunal under section 45(1) shall be made by notice in writing, hereinafter referred to as a ‘Notice of Appeal’, signed by the appellant or his attorney-at-law. The Notice of Appeal shall be filed in the office of the Permanent Secretary within the period of ten days stipulated in the above mentioned subsection and immediately thereafter a copy thereof shall be served by the appellant upon the executive secretary and upon all

parties who may have filed objections or been heard at the hearing of the application to which the appeal relates.”

22. Rule 3 is out of date in that appeals to the Tribunal are brought under section 48(1) of the Development and Planning Act (not section 45(1) as stated in rule 3) and the statutory time limit under section 48(1) is 14 days (not 10 days as stated in rule 3).

23. Under rule 3:

- (1) The Appellant must file the Notice of Appeal on the Permanent Secretary within 10 days.
- (2) The Notice of Appeal merely records that the appellant appeals against the decision. It cannot identify the grounds of appeal because the CPA’s formal reasons for the decision will not yet have been provided (see rule 4, below). The grounds of appeal are provided later, under rule 5 (see below).
- (3) The Appellant must “*immediately*” (which is not defined) serve the Notice of Appeal on the Executive Secretary and on those who were heard before the CPA. It has to be served on the Executive Secretary to trigger the production of the formal reasons for the decision (see rule 4, below). However, it is only served on other persons for the purposes of information because, at this stage, there is no action for such persons to take in consequence of being served with the Notice of Appeal.
- (4) The Rules do not specify any consequences for failing to comply with any of the steps in rule 3.

24. As noted at section A above, the Applicants filed the Notice of Appeal on time, paid the filing fee of \$50 and immediately served it on the Executive Secretary, but overlooked the requirement immediately to serve it on the Developer. However, the Developer was informed by the Planning Department that the Notice of Appeal had been filed on the same day that it was filed. At 10.48am on 4 December 2024, the Planning Officer emailed the developer: “*We received an appeal within the statutory time frame*”.

25. Rule 4 of the Rules provides:

“The executive secretary shall, within fourteen days after service upon him of the Notice of Appeal, prepare and forward to the Permanent Secretary and to the appellant (or his attorney-at-law) an indexed brief containing copies of all documents, correspondence and other papers and exhibits which were presented to the Central Authority on the hearing of the application to which the appeal relates as well as a statement in writing from the Chairman of the Central Planning Authority stating the reasons for its decision.”

26. The Rules do not define “days”. The expression therefore takes its meaning from the Development and Planning Act under which the Rules were made (Bennion on Statutory Interpretation, section 18.10) which, at section 2, defines “days” to mean “calendar days unless otherwise specified”. Section 8 of the Interpretation Act provides that, unless the contrary intention appears, time runs from the day after the specified event and Sundays and public holidays are treated as excluded days.

27. Thus:

- (1) The Executive Secretary must provide the Permanent Secretary and the appellant with the indexed brief within 14 days of service of the Notice of Appeal.
- (2) The Executive Secretary needs to have been served with the Notice of Appeal under rule 3 to trigger his duty to forward an indexed brief to the appellant and the Permanent Secretary.
- (3) The Executive Secretary’s compliance with this rule is essential to enable the appeal to progress because (a) the appellant needs the formal statement of reasons in order to prepare the Grounds of Appeal required under rule 5 (below), and (b) the appeal cannot proceed without the Permanent Secretary’s Record of Appeal and the Permanent Secretary cannot prepare the Record of Appeal unless and until he receives the brief from the Executive Secretary (see rule 6, below).

- (4) By contrast, none of the persons required to have been served under rule 3 (other than the Executive Secretary) are required to take any action in response. The progress of the appeal does not in any way depend on them having been served.
- (5) The Rules do not specify any consequences for the Executive Secretary failing to comply with the steps in rule 4.
28. The Executive Secretary breached the time limit specified by rule 4. Applying section 2 of the Development and Planning Act and section 8 of the Interpretation Act, the deadline for him to provide the indexed brief to the Permanent Secretary was 20 December 2024, but he failed to provide it until 30 December 2024. Nobody has suggested that this breach of the statutory time limits in the Rules invalidated the appeal.

29. Rule 5 of the Development and Planning (Appeals) Rules provides:

“(1) The appellant shall, within fourteen days of the service upon him of the brief mentioned in rule 4, file in the office of the Permanent Secretary- (a) the grounds of appeal upon which he intends to rely; and (b) the form or order he seeks.

(2) A copy of the grounds of appeal shall be served by the appellant on all parties to whom the Notice of Appeal has been addressed.”

30. Thus:

- (1) The Appellant must file Grounds of Appeal with the Permanent Secretary within 14 days. This is essential to enable the appeal to progress because rule 6 (below) provides that the Grounds of Appeal must form part of the Permanent Secretary’s Record of Appeal.
- (2) By contrast, none of the persons required to be served under rule 5 are required to take any action in response. The progress of the appeal does not in any way depend on them having

been served. Indeed, the Rules do not prescribe any deadline within which the Appellant must serve the Grounds of Appeal on other parties.

(3) The Development and Planning (Appeals) Rules do not specify any consequences for failing to comply with any of the steps in rule 5.

31. As noted at section A above, the Applicants filed the Grounds of Appeal on time and immediately served them, together with a bundle containing the Notice of Appeal, on the Developer.

32. Rule 6 of the Development and Planning (Appeals) Rules provides:

“(1) The Permanent Secretary shall, upon being satisfied that rules 3, 4 and 5 have been complied with, prepare a Record of Appeal and set down the appeal for hearing by the Tribunal and shall give notice thereof to the chairman of the Tribunal, all members thereof, the appellant, the executive secretary and all persons entitled to be served with the Notice of Appeal.

(2) The Record of Appeal referred to in sub-rule (1) shall comprise the following documents-the Notice of Appeal, the brief prepared under rule 4, the grounds of appeal, the form or order sought and any other document that the Chairman of the Tribunal may direct shall be included therein. The Record shall be bound, or otherwise securely fastened together, and the pages numbered in the order in which they appear therein.

(3) The Permanent Secretary shall give copies of the Record of Appeal to the Chairman of the Tribunal, all members thereof, the appellant and the executive secretary at the same time as the notification under sub-rule (1).”

33. Thus:

(1) The Record of Appeal is the bundle of documents that is needed by the Tribunal to hear the appeal and is needed by all persons wishing to participate in the appeal.

(2) Rule 6 ensures that all interested persons are notified of the appeal. Thus, any omission to serve the Notice of Appeal or Grounds of Appeal on interested persons will be remedied by the Permanent Secretary serving the Record of Appeal.

34. Rule 17 of the Rules provides that *“Time may be extended for good cause shown in the case of appeals to the Tribunal, by the Chairman, and in the case of appeals to the Grand Court, by a judge”*. This gives effect to section 48(1) of the Development and Planning Act (*“Any person ... may, within fourteen days of notification of that decision under section 40, or within such longer period as the Tribunal may in any particular case allow for good cause, appeal...”*). Rule 17 does not state that an appeal that has been lodged in time in accordance with section 48(1) of the Development and Planning Act is rendered invalid by a failure to follow any of the procedural requirements in the Rules in the absence of an extension of time.

35. This can be contrasted with the Grand Court Rules. Those rules state that a writ or originating summons *“is valid in the first instance for”* the specified period, but *“the Court may by order extend the validity of the writ”* (Order 6, rule 8). This form of rule expressly states that the consequence of not obtaining an extension of time is that the originating document is rendered invalid. By contrast, the Development and Planning (Appeals) Rules say nothing to indicate that a delay in service renders an Appeal Notice invalid.

36. On 13 January 2025, the Developer’s attorney objected to the appeal being heard on the grounds of non-compliance with rule 3 of the Rules. On 11 February 2025, the Applicants’ attorney wrote to the Tribunal: *“We do not consider an application for an extension of time to be necessary as all documents were filed within the required timeframes. Mr Jackson complains about the timing of service of the Notice of Appeal. Although I do not consider the application necessary, out of an abundance of caution I attach a [rule] 17 application together with our draft submissions addressing the underlying appeal. These draft submissions are provided to show that our client’s appeal is arguable, being one limb of the test for the granting of an extension of time. I invite you to find that no extension of time is required or, if you find an extension is necessary, to grant [the] same”*.

B.3 Applying the Soneji principle to this case

37. As noted above, neither the Act nor the Rules contain any “*express statement of the consequences of non-compliance*” with any of the Rules. In these circumstances, the UK Supreme Court has held that the court must “*look carefully at the whole of the structure within which the requirement arises and ask what consequences of non-compliance best fits the structure as a whole*” (A1 Properties, para 68). As the Court of Appeal of England and Wales put it, one must consider whether the procedural requirements are essential parts, as opposed to supportive parts, of the statutory machinery (*Frogmore Developments*, p886).

38. Some parts of the planning appeal machinery are clearly essential. As noted above:

(1) The appeal has to be commenced by filing a Notice of Appeal within the limitation period (section 48(1); rule 3).

(2) The appeal has to be determined on the record of hearing (section 48(1); rule 6), and in order for the record of hearing to be produced, the Executive Secretary must be served with the Notice of Appeal (rule 3), the Executive Secretary must provide a brief to the Permanent Secretary (rule 4) and the Appellant must file Grounds of Appeal (rule 5).

(3) The rights of interested parties, such as developers, are safeguarded by requiring the Permanent Secretary to give notice that the appeal is being set down for hearing by (rule 6).

39. It may well be that a failure to comply with those requirements would invalidate the appeal in the absence of extension of time. However, all of those requirements were satisfied in this case within the prescribed periods.

40. By contrast, the requirement to serve the Notice of Appeal on a developer (rule 3) and Grounds of Appeal on a developer (rule 5) is not provided for in the Act at all and is not part of the essential machinery of the Rules (albeit rule 5 was fully complied with in this case). This is

because the developer will always be served with notice of the proceedings by the Permanent Secretary under rule 6 in any event. There is no risk that a developer will be denied a fair opportunity to oppose the appeal as a result of a failure to serve the Notice of Appeal (rule 3) or the Grounds of Appeal (rule 5). Nevertheless, it may well be that a failure to serve a Notice of Appeal on a developer would render the appeal voidable at the suit of the developer (as opposed to automatically void) if (for example) he has suffered irremediable prejudice through non-service. This was the conclusion reached by the UK Supreme Court in *A1 Properties*. However, there was no such application in this case.

41. The existence of the Tribunal's broad power to extend time under rule 17 does not avoid the need for this interpretative exercise because – as the UK Supreme Court put it in *A1 Properties* – the Rules do not contain any “*express statement of the consequences of non-compliance*” with the service requirement under rule 3. The Rules do not say that a delay in service invalidates the appeal in the absence of an extension of time.

42. There are four further points:

- (1) First, the Developer in this case was in fact notified in time by the CPA that a Notice of Appeal had been filed. The Developer did not lose anything by not seeing the Notice of Appeal at that stage, because it contains no information beyond the fact that an appeal is being pursued. The failure to serve under rule 3 therefore had no practical effect.
- (2) Second, rule 5 requires the Grounds of Appeal to be served on a developer just as much as rule 3 requires the Notice of Appeal to be served on a developer. However, rule 5 does not specify any time limit for serving the Grounds of Appeal and, accordingly, there is no time limit that is capable of being extended under rule 17. It follows that a delay in serving the Grounds of Appeal could not invalidate an appeal. It would be anomalous to construe the statutory scheme as mandating that a delay in service of the Notice of Appeal invalidates an appeal (absent an extension of time) when a delay in serving the Grounds of Appeal (by however long) could not have that effect.

- (3) Third, if (contrary to the Applicants' submissions) a breach of the requirement to serve third parties under rule 3 renders an appeal void (as opposed to voidable), then one needs to be able to identify the precise moment at which the appeal is rendered void. All participants in the appeal process would need to know the exact moment that the carriage turns into a pumpkin. This would require a period for service measured in units of time. But rule 3 requires service "*immediately*". This does not enable an appellant, or third parties, to know with precision if or when an appeal has become invalid. For example, if an appellant takes 6 hours to post the Appeal Notice, rather than running to the post box, has the appeal become invalid? This again tells against a breach of the requirement resulting in automatic invalidity.
- (4) Fourth, there is a hard-edged time limit within which the Executive Secretary must provide the brief to the Permanent Secretary and that time limit was breached in this case. But there has rightly been no suggestion that this automatically invalidated the appeal. Why is that the case? The reason is that, on a proper interpretation of the statutory framework, the legislator did not intend this to invalidate the appeal. Applying that same exercise of statutory interpretation to rule 3, it can be seen equally that it cannot have been the legislator's intention that a delay in service automatically invalidates an appeal.

B.4 The Tribunal's reasoning

43. The Applicants advanced full submissions to the Tribunal on the application of the *Soneji* principle: see section B of the Applicant's speaking note.

44. The totality of the Tribunal's reasoning on this point was as follows:

"I have concluded that Ms McClymont is wrong in her interpretation of our law. The Rules are clear and the requirements for effecting an appeal are clearly specified. I shall elaborate on this in my conclusions. I shall not go into detail on the case law that Ms McClymont has provided to establish her arguments regarding service of notice as I do not consider her arguments trying to justify why she did not adhere to the Rules with respect to service of appeals to be meritorious".

Having indicated that the conclusions would elaborate those reasons, the Tribunal's conclusions simply stated: *"There is no separation in Rule 3 of the Rules between filing and service of the notice of appeal. When appealing a decision one must file the Notice of Appeal and immediately serve the notice on all parties. It is a two-part process and failure to serve renders the Notice invalid"*.

45. The Tribunal's suggestion that the Applicants were trying to "justify" non-service was inaccurate. The Applicants had not suggested that the Rules should not be adhered to or that they were justified in omitting to serve the notice of appeal. This argument related solely to the legal consequences of the breach of this procedural requirement.
46. The Tribunal did not adequately assess the legal consequences of breaching the rule 3 requirement to serve the Notice of Appeal on third parties. It did not address the key case law. It did not identify the *Soneji* principle. It did not attempt to apply the principle to this statutory scheme.
47. The Tribunal correctly identified that *"When appealing a decision one must file the Notice of Appeal and immediately serve the notice on all parties"*. But that was common ground and should have been the starting point for the analysis. The question, as in *Soneji* and *AI Properties*, was: what are the consequences of non-compliance? That was a question of statutory interpretation.
48. The Tribunal failed to make any attempt to interpret what the legislator intended the consequences to be of non-compliance with the requirement to serve third parties. It simply moved from the (accepted) position that the Rules require the Notice to be served immediately to the conclusion that a breach of this requirement renders the Notice *"invalid"*.
49. If the Tribunal had done what the UK Supreme Court had identified was required (*"look carefully at the whole of the structure within which the requirement arises and ask what consequences of non-compliance best fits the structure as a whole"*), it would have appreciated that service of the Notice of Appeal on third parties is not part of the essential machinery of

the appeal process because it has no legal consequences, given that there is no consequential action that depends on the Notice of Appeal being served at that stage. It is the Record of Appeal that triggers the involvement of third parties (if they wish to be involved) and they are notified of the Record of Appeal by the Permanent Secretary, not the Appellant.

50. As noted above, it may be that, as in *AI Properties*, the Developer could have applied to have the appeal voided for non-service, but there was no such application in this case and, in any event, such an application would have been impossible given that the Developer at all times knew that the Notice of Appeal had been filed in time.¹

51. For the purposes of this leave application, it is (at least) arguable that the Tribunal erred in (a) failing to conduct the exercise in statutory construction required under the *Soneji* principle and (b) was wrong to conclude that, absent an extension of time, any delay in serving an Appeal Notice automatically invalidates an appeal.

C. GROUND 2 – FLAWED ASSESSMENT OF THE APPLICATION TO EXTEND TIME

52. The Tribunal only needed to consider the application to extend time because it had concluded that a delay in serving a Notice of Appeal under rule 3 otherwise rendered it invalid. Thus, if this claim for judicial review succeeds on ground 1, it will be unnecessary for the Grand Court to consider ground 2.

C.1 The Tribunal's composite approach

53. The Tribunal recorded authorities for the proposition that an assessment of whether to extend time requires all relevant factors to be considered in combination and that the absence of good

¹ The Tribunal's conclusion (in the context of the application to extend time, not the *Soneji* issue) that the Developer had been prejudiced is no answer to this because this conclusion presupposed that the appeal was void (as opposed to voidable). So, the Tribunal appears to have reasoned, the Developer was entitled to treat the appeal as void, even though he knew that the Appeal Notice had been filed in time. This seems to be what the Tribunal meant when it stated, somewhat cryptically, that "*the appeal had not been perfected*" (para 8 of the Conclusions of the Chairman). If a failure to serve the Notice of Appeal rendered the appeal voidable (as opposed to void), then the Tribunal could not have reached that conclusion.

reason for delay is not a sufficient reason to refuse to extend time: paragraph D10. The Tribunal did not question that proposition and proceeded to consider a number of factors in combination: the absence of reason for the omission, the length of the delay, the merits of the appeal, and prejudice to the Developer. The Tribunal did not conclude that any of those factors in isolation would have led it to refuse the application to extend time. Given that the Tribunal took an indivisible composite approach, it follows that if the Tribunal erred in its assessment of any of those factors, then its decision as whole cannot stand.

54. Thus, to succeed on judicial review ground 2, the Applicants only need to succeed on one of the submissions set out at sections C.2, C.3, C.4, C.5, C.6 or C.7 below. If the Court finds there to be one or much such errors in the Tribunal's decision to refuse to extend time, then the decision should be quashed and remitted to the Tribunal.

C.2 The Tribunal's inadequate reasons for concluding no realistic prospect of success

55. The Applicants had advanced five grounds of appeal, supported by detailed submissions. The Developer had responded in detail to those submissions. How did the Tribunal resolve those detailed competing submissions? All it said was as follows:

"Nothing in the present arguments advanced by the Appellant suggest that there is a realistic prospect or likelihood of success if the extension-and later leave to appeal- is granted. All of the arguments had already been presented to the Authority and considered. Notwithstanding the objections presented to the Authority, it nevertheless resolved to grant planning permission for the development subject to the stated conditions in the Reasons for the Decision."

56. Those reasons were manifestly inadequate. The Applicants had presented detailed legal grounds of challenge. For example, as set out at section C.3 below, ground 1 of appeal concerned the proper interpretation of "*non-habitable space*" in regulation 8(4) of the Development and Planning Regulations. Did the Tribunal attempt to interpret the Regulations? If so, why did it think that the Applicants' interpretation had no realistic prospect of success?

The Tribunal's decision contained no explanation at all. The only point the Tribunal made was that the CPA had already considered the issues, but the views of the CPA could not determine the prospects of success of this ground because it turns on a question of statutory interpretation, not planning judgement.

57. As the Court of Appeal of England and Wales has explained in the respect of the duty to give reasons for judicial decisions: *"The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in Ex parte Dave) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not"* (*Flannery v Halifax Estate Agencies* [2000] 1 WLR 377, 381).

58. This case concerns a decision by an administrative tribunal rather than a court, but the same reasoning applies (as noted by the Court of Appeal of England and Wales in *Dunster Properties Ltd v First Secretary of State* [2007] 2 P & CR 26).

59. The Tribunal's reasons were inadequate because the decision leaves the Applicants with absolutely no idea why the Tribunal thought that none of the five grounds of appeal had any realistic prospect of success. Given that the Tribunal's conclusion on prospects of success formed an inextricable part of its decision on extending time, it follows that the decision cannot stand.

60. That is enough to resolve the case. However, further or alternatively, each of the grounds of appeal before the Tribunal plainly do have (at the very least) a real prospect of success. In particular, the Applicants submit that Appeal Grounds 1, 2 and 5 plainly have a realistic prospect of success, for the reasons set out below.

C.3 Appeal ground 1 has a realistic prospect of success

61. Regulation 8(2)(e)(i) of the Development and Planning Regulations provides that: *“when the building is a hotel or apartment in Hotel/Tourism zone 1 or in Hotel/Tourism zone 2, the maximum permitted height is one hundred and thirty feet or ten storeys, whichever is less”*.

62. Regulation 2 defines “storey” as *“that portion of a building included between the surface of any floor and the surface of the floor next above it or if there be no floor above it, then the space between such floor and the ceiling next above it”*.

63. Regulation 8(4) and 8(4A) identify exemptions from that ten-storey limit:

“(4) Paragraph (2) does not apply to any chimney, storey below grade, church spire, dome, cupola, stage tower, water cooling tower, elevated water storage tank, elevator tower, radio or television antenna tower, smokestack, parapet wall or structure of a like nature, non-habitable ancillary spaces, and any necessary mechanical appurtenances thereof:

Provided that —

(a) in Grand Cayman the maximum permitted height of any such structure and appurtenance, if any, shall not exceed the height limitation prescribed by the Director of Civil Aviation within the flight approach zone pattern of the Owen Roberts International Airport; and

(b) in the case of a radio or television antenna tower or structure of a like nature where the structural stability of the tower or structure is reliant upon guys, it shall not be erected on any lot nearer to any of the boundaries of that lot than a distance less than the height of such structure or appurtenance.

(4A) Notwithstanding paragraph (2), the maximum permitted height of a building in the zones specified in paragraph (2)(a), (c), (e) and (f) may be increased, upon application, at the discretion of the Authority by no more than one storey for the purpose of the erection of a structure on the roof of a building where the structure will be —

(a) for the common use areas and public use areas of the building; and

(b) to enhance the primary use of the building,

and the following conditions shall apply —

(i) no more than one application shall be made under this regulation;

(ii) if covered by a roof, the square footage of the structure shall not be greater than seventy per cent of the square footage of the storey immediately below the roof;

(iii) the height of the structure shall not exceed any limit in height as may be prescribed by the Cayman Islands Airports Authority with regard to the flight approach zone patterns of an airport, whichever is the lesser of the two;

(iv) the floor to ceiling height of the structure shall not exceed ten feet;

(v) the provisions of paragraph (4) shall not apply so as to permit the placement of any structure or appurtenance on the roof of the structure;

(vi) written notice shall be given to adjacent landowners in respect of the proposed use; and

(vii) the structure shall comply with the *Building Code Regulations (2022 Revision)*.”

64. Thus, in broad terms, regulation 8(4) provides an exemption for things like chimneys and antennas, and regulation 8(4A) allows a developer to apply for an exemption for a roof structure for “*common use areas and public use areas*”.

65. The development in question is 11 storeys. As explained at paragraph 7 of the CPA’s reasons for granting planning permission, and as the plans show, the 11th storey is for common use areas: swimming pools and common use restrooms. There is no ceiling over the swimming pools such that they do not come within the definition of “*storey*” in regulation 2. However, there is a ceiling above the common use restrooms, so planning permission could not be granted unless the Developer could bring the 11th storey within the regulation 8(4)-(4A) exemptions.

66. The Developer was unable to make use of the “*common use areas*” provision under regulation 8(4A) because, contrary to regulation 8(4A)(b)(iv), the floor to ceiling height of the proposed 11th storey exceeds ten feet. The only remaining line of argument for the Developer was to contend that the 11th storey comprises “*non-habitable ancillary space*” within the meaning of regulation 8(4). The CPA accepted that argument.

67. Appeal ground 1 is that the CPA misinterpreted the meaning of “*non-habitable ancillary space*”, as that expression is used in regulation 8 of the Development and Planning Regulations. In summary:

- (1) The restrooms are unquestionably “*common use areas*”. They are for the common use of residents and their guests when using the 11th storey pools and amenity space. It is regulation 8(4A) that governs “*common use areas*”. If the concept of “*non-habitable ancillary space*” already covered “*common use areas*”, then regulation 8(4A) would not have been enacted because regulation 8(4) would already have exempted such areas. As explained at section 21.2 of Bennion on Statutory Interpretation: “*Given the presumption that the legislature does nothing in vain, the court must endeavour to give significance to every word of an enactment*”. Thus, “*non-habitable ancillary space*” cannot be interpreted as embracing “*common use areas*” like communal restrooms. It follows that the 11th storey could not be exempted under regulation 8(4) and the CPA erred in law.
- (2) This interpretation is consistent with the list in which “*non-habitable ancillary space*” is included in regulation 8(4). It is part of a list of spaces that are not used by people, such as water storage tanks, radio towers, and smokestacks. Applying the *ejusdem generis* principle, this is a further indication that “*non-habitable ancillary space*” does not embrace “*common use areas*” like communal restrooms.
- (3) This reading makes obvious good sense. To read “*non-habitable ancillary space*” as embracing “*common use areas*” like communal restrooms would transform regulation 8(4) from being a narrow carve-out for ancillary things like water storage tanks into a general licence to build multiple storeys providing key facilities to residents, such as gyms, cinemas, covered swimming pools and changing rooms. That is fundamentally incompatible with the careful, narrow approach taken in regulation 8 as a whole and regulation 8(4A) in particular.

68. The only counterargument advanced by the Developer was that bathrooms do not count as “*habitable space*” for the purposes of the International Building Code 2009, which has been

adopted in the Cayman Islands. The Developer contends that, if bathrooms are excluded from “habitable space” under the Building Code, then they must be included in the meaning of “non-habitable ancillary space” in the Planning Regulations. However:

- (1) The surest guide to the meaning of the Development and Planning Regulations is the language and structure of the Regulations. As the UK Supreme Court explained in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2023] AC 255, paras 29-30: “Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained ... External aids to interpretation therefore must play a secondary role...”. As set out above, read in the context of regulations 8(4) and 8(4A), it is plain that the term “non-habitable ancillary space” does not exclude storeys containing common use areas such as changing rooms and restrooms from being exempted from the 10-storey limit on development. That cannot be displaced by the International Building Code 2009 which, at best, is an external aid to construction and could only play a secondary role in interpreting the Development and Planning Regulations.
- (2) The Development and Planning Regulations have referred to the concept of habitable space since 1972 (section B of the 1972 Regulations provided that “No dwelling house shall exceed two habitable storeys”). The concept must bear the same meaning in the 2018 Revision as it has done since 1972. A Building Code drafted in 2009 cannot retrospectively change the meaning of the concept of habitable space in the Development and Planning Regulations.
- (3) The Building Code performs a different function to the Planning Regulations. The Building Code is concerned with internal design standards, and whether a room is classed as habitable space is relevant for the purposes of determining (for example) minimum light,

ventilation and fire safety standards. By contrast, the Planning Regulations are concerned with land use planning, including the impact of buildings on their surroundings and the visual amenity of an area. For that purpose, what matters is how a building looks rather than how a particular room is used. Accordingly, there is no reason to suppose that the drafter of the Planning Regulations intended “*non-habitable ancillary space*” to be read by reference to the term “*habitable space*” in the Building Code.

(4) If the drafter of the Development and Planning Regulations had intended to adopt the approach to habitability in the Building Code, he could easily have said so. However, there is no such provision and, given that planning legislation and building legislation deal with separate subject matters, this is entirely unsurprising.

69. This appeal ground has a realistic prospect of success and the Tribunal was wrong to conclude otherwise. For the purposes of this leave application, the Applicants only need to show that it is arguable that Appeal Ground 1 has a realistic prospect of success. That threshold (that it is *arguable* that it is *realistic*) is a low one.

C.4 Appeal ground 2 has a realistic prospect of success

70. Section 13(1) of the Development and Planning Act provides: “*Except where otherwise provided for by this Act, permission shall not be given which would result in a development at variance with a development plan*”.

71. Paragraph 3.04 of the Development Plan provides: “*The Authority shall take into consideration the characteristics of the form of tourist accommodation proposed and shall be satisfied that the layout, scale and massing of development are compatible with the ecological, aesthetics, and other physical characteristics of the site; and that a high quality of design and landscaping are used*”.

72. As the UK Supreme Court has explained, a development plan must be “*interpreted objectively in accordance with the language used, read as always in its proper context*” and its proper

meaning is therefore a question of construction for the Court (*Tesco Stores v Dundee City Council* [2012] PTSR 983, para 18).

73. As noted above, paragraph 3.04 of the Development Plan requires the CPA to assess whether the layout, scale and massing of development is compatible with the “*characteristics of the site*”. The only sensible reading of this is that the “*characteristics of the site*” includes its surroundings. For example, the characteristics of this site include that it is next to Seven Mile Beach. Indeed, it would be a very poor development plan that failed to make provision for the consideration of the impact of a development on its surroundings.
74. The Developer argued for a different interpretation of the Development Plan. It contended that, so long as the maximum limits in the Development and Planning Regulations are satisfied, the CPA cannot assess the impact of the proposed development on its surroundings. It relied on a previous decision of the Tribunal, *Libanon Corporation v CPA*, in which the Tribunal (with the same Chair presiding) held that, for the purposes of paragraph 3.04 of the Development Plan, “*characteristics of the ‘site’ ... is confined to the lot itself*” (para 13). For the reasons set out above, the Applicants submit that this based on a misinterpretation of the Development Plan and was therefore wrong in law.
75. However, the CPA accepted the Developer’s submissions. It decided that: “*The proposed development does not represent over-development of the site as it complies with all minimum required setbacks, the maximum allowable site coverage and the maximum allowable building height*”. The words “*as it*” indicate that the CPA accepted the Developer’s submission that compliance with the maximum limits in the Development and Planning Regulations were dispositive of the Development Plan question of whether “*the layout, scale and massing of development are compatible with the ecological, aesthetics, and other physical characteristics of the site*”. The CPA therefore erred in the same way that the Tribunal erred in the *Libanon Corporation* case. This is the error identified in appeal ground 2(a).
76. The consequence of that error is that the CPA wrongly refused to consider the impact of the proposed development on neighboring properties. This was particularly significant given that, in her memorandum of 30 July 2024, the Director of Environment had stated on behalf of the

National Conservation Council: *"It is highly likely that the construction of the proposed development will lead to overshadowing and blocking of daylight / sunlight from the southernmost units at Silver Sands, and from a significant portion of The Palms. As such we recommend that the CPA give due holistic consideration to the visual impacts and the impacts of daylight, sunlight and overshadowing, both at a development-specific scale and more generally as part of development planning for the islands"*. The CPA did not do so because it wrongly treated compliance with the Regulations as dispositive of the question of whether the height, scale and massing of the proposed development was appropriate at this location.

77. There was a further flaw in the CPA's reasoning. Section 10(1) of the Development and Planning Act requires the CPA to submit to Parliament proposed updates to the Development Plan at least every 5 years. In breach of that requirement, the CPA has failed to submit any updates to Parliament since 1997. However, it has now prepared a draft Final Planning Framework. Although it is still subject to Parliamentary approval, the draft Final Planning Framework represents the CPA's up-to-date assessment of appropriate planning considerations. The Applicants asked the CPA to have regard to that draft Final Planning Framework when deciding whether to grant planning permission. The CPA refused to do so, holding at paragraph 8(h) of its decision that *"Any reference to the draft Final National Planning Framework is irrelevant as that policy document has no legal standing because it has not been approved in Parliament"*. The CPA's refusal to consider the document on the ground of irrelevancy was wrong in law. The Development and Planning Act is modelled on UK planning legislation and the CPA's power to grant planning permission is closely analogous to the power of local authorities to grant planning permission in the UK. In the UK, it is well established that draft plans are not irrelevant, and can be taken into account as material considerations: see section P70.09 of the Planning Encyclopaedia. This is for the obvious reason that a planning authority's up-to-date published views on planning considerations are relevant to the exercise of its broad statutory power to grant or refuse planning permission under section 15(1) of the Act. This is the error identified in appeal ground 2(b).

78. This appeal ground has a realistic prospect of success and the Tribunal was wrong to conclude otherwise. Again, for the purposes of this leave application, the Applicants only need to satisfy the low threshold that it is arguable that Appeal Ground 2 has a realistic prospect of success.

C.5 Appeal ground 5 has a realistic prospect of success

79. Section 41(4)-(5) of the National Conservation Act provides:

“(4) Every entity, except Cabinet, in accordance with any guidance notes issued by the [National Conservation] 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.

(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.”

80. In *Central Planning Authority v National Conservation Council* [2023] 2 CILR 309, paragraphs 35-36, the Court of Appeal held:

“35. ...Section 41(5)(b) requires the NCC to direct refusal of planning permission where the NCC considers that the adverse impact of the proposed grant of planning permission

cannot satisfactorily be mitigated by conditions. This provision is of significance in two respects. First, the statute draws a distinction between the proposed action under subs (4) (see the opening words to subs (5)) and mitigation by conditions. This demonstrates that adverse impact of the proposed action means adverse impact foreseen without consideration of any suggested conditions. The concept of adverse effect in subs (3) and (4) must be the same as the adverse impact to which subs (5)(b) refers.

36. Second, it is plain that the power to consider and decide the extent to which conditions mitigate adverse effect or impact is conferred on the NCC. Similarly, in a case where the CPA does not consider that conditions are necessary, the NCC has the power to direct that permission should only be given subject to conditions under subs (5)(a).”

81. Thus, if the NCC directs that permission should only be given subject to certain specified conditions, then the CPA is prohibited from granting planning permission in the absence of those conditions. The CPA’s statutory duty is to impose the NCC’s conditions, not something approximating to the NCC’s conditions. The following chronology shows that the CPA failed to comply with that statutory duty.

82. On 12 September 2024, the CPA sought approval from the NCC under section 41(4) of the National Conservation Act to grant planning permission to the Developer.

83. The NCC responded in the following terms:

“Under Section 41 (5) of the NCA, in the exercise of powers which have been conferred through express delegation by the National Conservation Council, pursuant to section 3(13) of the National Conservation Act (2013) the Director of DoE, therefore, respectfully directs that the following conditions be imposed by the Central Planning Authority or Department of Planning, as part of any agreed proposed action for planning approval...”.

84. The directed conditions included:

- (1) "Turtle-friendly lighting" condition: *"Prior to the issuance of a Building Permit, the applicant shall prepare and submit a plan for review and approval to the Department of Environment for turtle friendly lighting, which minimises the impacts on sea turtles."*
- (2) "Turtle-friendly construction fencing" condition: *"Prior to the issuance of a Building Permit, beachside construction fencing associated with the works shall be installed and be positioned 75 from the Mean High Water Mark. The fencing shall be erected so that it fully encloses the beach-facing area of works and is embedded at least 2 feet into the beach profile to prevent turtles from entering the construction site or digging under the fencing. The applicant shall liaise directly with the Department of Environment for requirements guidance regarding this fencing. The Department of Environment will inspect the fencing and confirmation of the Department of Environment's written approval must be received by the Planning Department prior to the issuance of the Building Permit."*
- (3) "Beach quality sand" condition: *"The void remaining following demolition, and removal of the existing pool shall be filled with site-derived beach quality sand; Any sand that is to be excavated during construction shall be retained on-site and beach quality sand shall be placed along the active beach profile".*

85. As noted above, the CPA was under a legal duty not to grant planning permission without imposing the conditions directed by the NCC. The CPA breached that duty because, although it imposed conditions that were similar to those directed by the NCC, they were materially different:

- (1) "Turtle-friendly construction fencing" condition. Instead of the condition directed by the NCC, the CPA imposed the following condition: *"beach side construction fencing associated with the works shall be positioned at the minimum required high water mark setback, or greater if feasible (to minimise impacts on the turtle nesting habitat) and the fencing shall be erected so that it fully encloses the beach facing area or works and is*

embedded at least 2 feet into the beach profile: to prevent turtles entering the construction site or digging under the fencing, during nesting season. The applicant is directed to liaise with the Department of Environment regarding guidance notes for the appropriate type or fencing". Whereas the NCC had directed that the fencing had to be inspected and approved by the Department of Environment (*i.e.* the body with the relevant conservation expertise), the CPA's condition made no provision at all for inspection and approval.

- (2) "Turtle-friendly lighting" condition. Instead of the condition directed by the NCC, the CPA imposed the following condition: *"The applicant shall submit a plan for turtle friendly lighting which minimizes impacts on sea turtles and is prepared in accordance with the Department of Environment's guidelines and approved by the Central Planning Authority"* and *"If a turtle lighting plan has been required, confirmation from the Department of Environment that the installed lighting complies with the plan, with final confirmation provided by the Authority or delegate"*. Whereas the NCC had directed that the lighting plan had to be approved by the Department of Environment (*i.e.* the body with the relevant conservation expertise), the CPA's condition made the CPA responsible for approval of the plan (when the CPA does not have equivalent conservation expertise). The CPA's condition only provided for the Department of Environment to confirm whether the lighting complied with the plan approved by the CPA.

- (3) "Beach quality sand" condition. Instead of the condition directed by the NCC, the CPA imposed the following condition: *"Any sand that is excavated during construction shall be retained on-site and only with the prior consultation and approval of the DOE will beach quality sand shall be placed along the active beach profile. If there is an excessive quantity of sand that cannot be accommodated on-site, and the applicant would like to move such sand offsite, it shall be the subject to a separate application for planning permission and separate consultation with the National Conservation Council"*. Whereas the NCC had directed that the void following demolition had to be filled with site-derived beach quality sand, the CPA's conditions made no such provision.

86. In *National Conservation Council v Central Planning Authority* [2025] CIGC (Civ) 6, the Grand Court held that the NCC had again breached section 41 of the National Conservation

Act. Accordingly, this is now the second time that the CPA has failed to comply with the Court of Appeal's definitive guidance on the operation of section 41 of the National Conservation Act.

87. Before the Tribunal, the Developer submitted that the CPA had included the conditions directed by the NCC (paragraph F45). However, as set out above, that was plainly incorrect.

88. This appeal ground has a realistic prospect of success and the Tribunal was wrong to conclude otherwise. Again, for the purposes of this leave application, the Applicants only need to satisfy the low threshold that it is arguable that Appeal Ground 5 has a realistic prospect of success.

C.6 The Tribunal's calculation of the delay

89. At paragraph 3 of its conclusions, the Tribunal recorded that the delay in service was 42 days. This was wrong in law. If the requirement for immediate service under rule 3 meant that the appeal was a nullity unless the Appeal Notice was served on the Developer on 4 December 2024, then the delay until 13 January 2025 adds up to 31 days. This is because, under section 2 of the Development and Planning Act and section 8 of the Interpretation Act (see paragraph 27 above), Sundays and public holidays do not count.

90. The Tribunal also failed to recognize that part of the delay was caused by the Executive Director's breach of the statutory time limits. Had the Executive Director served the indexed brief on the Applicants on time, the bundle containing the Grounds of Appeal and Notice of Appeal would have been served on the Developer earlier.

C.7 The Tribunal's flawed assessment of prejudice

91. The Developer accepted that he had received email confirmation from the Planning Department on 4 December 2024 that an in-time appeal had been filed. Nevertheless, he contended that he was "*potentially*" prejudiced by the delay in formally being served with the Notice of Appeal. As recorded at paragraph F46 (under the heading "potential prejudice") the

Developer set out certain costs associated with the development incurred from 3 December 2024. However, the Developer rightly did not suggest that he would not have incurred those costs if he had been served with the Notice of Appeal.

92. As recorded at paragraphs D11-14 of the Tribunal's decision, the Applicants submitted to the Tribunal that the delay in service had not caused any delay to the Developer because:

- (1) There was no evidence that the Developer would not have taken the identified steps if he had been formally served with the Notice of Appeal (as opposed to being told that the Notice of Appeal had been filed).
- (2) The Developer's own figures showed that his decision to incur costs on the development had nothing to do with service of the Notice of Appeal. He spent \$150,000 on architectural and design fees on 3 December 2024, which was the day before the deadline for appealing against the CPA's decision, which shows that he intended to proceed with the development regardless of the risk that the permission would be overturned on appeal. He also continued to enter into contracts after he was served with the Notice of Appeal on 13 January 2025.
- (3) The Developer's submissions did not address the Applicant's submission that the delay in service had not caused him any prejudice.

93. How did the Tribunal resolve this issue? The totality of its reasoning was as follows:

"The fact that the Developer was not served with the Notice of Appeal when it was filed obviously led the Developer into believing that the appeal had not been perfected despite the knowledge of the filing gleaned from the Department of Planning. The appeal had not been perfected, and the Developer had proceeded accordingly, under the belief that the planning approval was unchallenged. I find that in exercising my discretion to extend time for filing would be prejudicial to the Developer who could not be compensated in costs and accordingly, accept the arguments of the Second Respondent concerning prejudice, save that the estimate of costs remain unsubstantiated." .

94. That reasoning was flawed because:

- (1) The question was whether the procedural omission had caused the Developer any prejudice, rather than whether a successful appeal would prejudice the Developer. In stating that “*the Developer had proceeded accordingly, under the belief that the planning was unchallenged*”, the Tribunal appeared to conclude that the procedural omission had caused prejudice.
- (2) However, as noted above, the timing of the payments made by the Developer indicated that he would have proceeded even if he had been served with the Notice of Appeal which he knew had been filed. The Tribunal was, at the very least, required to confront that submission and assess the evidence. Its reasoning completely failed to do so. This constituted a breach of the requirement of “*process rationality*”, which requires that “*the process of reasoning should contain no logical error or critical gap*” (*R (KP) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] EWHC 370 (Admin), para 56).

C.8 Conclusion on ground 2

95. As noted at section C.1 above, the Applicants only need to succeed on one of the submissions set out at sections C.2, C.3, C.4, C.5, C.6 or C.7 for ground 2 of the claim for judicial review to succeed. They have (at least) an arguable chance of doing so and, accordingly, leave to apply for judicial review should be granted.

D. RELIEF SOUGHT

96. The Applicants seek an order quashing the Tribunal’s decision, such further or other relief as needed to give effect to the Court’s judgment, and costs.

E. CONCLUSION

97. For the reasons set out above, the decision of the Tribunal should be quashed.