



Final Report:

PRIDE Jamaica Project

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**“REPORT AND RECOMMENDATIONS”
FOR STATUTORY ENABLING OF A “TWO-TIERED APPROACH”
TO DEVELOPMENT APPROVALS
AND
ENHANCING THE CURRENT SYSTEM IN THE INTERIM
FOR BETTER UNDERSTANDING BY REGULATORY APPROVAL AGENCIES
OF THE OBLIGATIONS OF THE STATUTORY DUTY OWED TO DEVELOPMENT APPROVAL
APPLICANTS**

Table of Contents

Preface	2
1. Background	2-3
2. Primary Development Approvals Agencies - Statutory authority	3-4
3. Legislative Framework for Development Approvals	4-9
4. Proposal for Amendments through Local Government Reform	9
5. Two Tier Development Approval Concept Origins	9-10
6. Recommended LPA Approvals process changes, Perceptions of Impediments	10-11
7. Analysis- Court decisions prescribing the legal Obligations due to Applicants	11-17
8. Conclusions- Summary of the legal obligations	17-18
9. Recommendations	18-19

PREFACE

The PRIDE Jamaica ACRE Task Force was established to provide technical assistance, conduct monitoring activities and give oversight to the recently established Development Assistance Centre, as well as to provide follow-up recommendations for further reform of the Development Approvals Process.

The Task Force has accepted that the time required to review, draft amendments, and pass legislation to streamline the development approvals process cannot meet the immediate timeline for implementation of the one stop shop process. There is also the view derived from best practices that some form of overarching legislation may be the more effective approach to the legislative solution.

The Task Force has taken a close look at existing common-law as it affects (a) the shortcomings of delay in the processing of applications and (b) lack of provision of critical feedback to applicants. It has concluded that the common law does give full support to purging the development approvals systems of those shortcomings, without resort to legislation.

This Report and Recommendations document will address the issue that in the short term the two critical areas of deficiency (a) and (b) stated above may be addressed by a program to make the relevant agencies aware of the legal obligation which they have to applicants at common law and the importance of adhering to those standards as critical performance benchmarks to measure the efficiency of their existing operations.

Its intent is to support PRIDE Jamaica's Subcomponent -IR1.2 'Institutional capacity for administration strengthened.'

1. BACKGROUND

On March 30, 2010 Hon. Daryl Vaz, Minister with responsibility for Information Telecommunication and Special Projects, announced the start of the pilot for a Development Assistance Centre. It had been recognized and widely acknowledged that the current development application approval process has been criticized as being inefficient, in terms of the time taken to process applications. Minister Vaz told Parish Council representatives and other agency officials at a sensitization presentation at Jamaica House Monday (March 29) that;

"Not only is the process reported to be tedious, due to the circuitous route of the applications and the involvement of a myriad of commenting agencies, but it is also costly to both the applicant and the Government,"

"Along with the establishment of this two-tier system, it is hoped that the proposed DAC will considerably reduce the processing time for planning applications, thereby improving service delivery to applicants,"

He further stated that the two-tier system for applications, characterized by large projects (tier one) and small projects (tier two), aims to eliminate the roundabout routing of applications by having the local authority, to whom the application is submitted, fully responsible and accountable for all aspects of the approval¹. It is in this context that this Report and its Recommendations are structured

2. PRIMARY DEVELOPMENT APPROVALS AGENCIES - STATUTORY AUTHORITY

Applications for development approvals are made to the Local Authority, known as the Parish Council or Municipal Council². The Jamaica Constitution is silent on the matter of local government. Parish Councils or Municipal Councils exist under the main Legislative enactments which are;

- Parish Councils Act 1887
- Parochial Rates and Finance Act 1900
- Kingston City Corporation Act 1923
- Municipalities Act 2003

The authority of local government is purely statutory, which means their functioning is circumscribed by laws enacted by central government and can be revoked at any time by national legislation. This means that Councils cannot act outside of the statute and cannot go beyond the power of the statute as interpreted by the Court.

There is also an ad hoc system for monitoring of development within each parish. Non-statutory bodies called Parish Development Committees have been established in all parishes, and involve representatives of local government, central government, the private sector, civil society and established non-governmental organizations. The role of these committees is to prepare parish development plans

¹ www.jis.gov.jm/news/opm-news/23424-officePM-development-assistance-centre-dac-now-at-nepa

² City of Portmore, St Catherine

in partnership with the local authorities, and to facilitate the participation of civil society in local government decision-making.

Research into their role and function has established that the Parish Councils or Municipal Councils lack the capacity and resources within the parishes to plan and manage growth or to meet the modern standards for improved service delivery at the local level. It has been recommended that a more integrated outlook of all development efforts taking place within a parish or region will allow for greater coordination of developmental tasks at the local level. ³

3. LEGISLATIVE FRAMEWORK FOR DEVELOPMENTS

The principal statutes governing the development of land in Jamaica are;

- (a) The Local Improvements Act- LIA
- (b) The Town and Country Planning Act- TCPA
- (c) The Parish Council's Building Act of 1908 and the KSAC's Building Act

The secondary statutes are

- a) Local Improvements (Community Amenities) Act
- b) The Water Resources Act
- c) Parish Water Supply Act
- d) Registration of Titles Act
- e) Registration (Strata Titles) Act
- f) Fire Brigade Act
- g) Public Health Act
- h) Main Roads Act
- i) The Survey Act

LIA

Essentially the LIA deals only with the subdivision of Land. Subdivision arises when any single tract of land is intentionally, separated physically into two or more parcels. Section 5 (4) of the LIA states in part that:

“... a person shall be deemed to lay out or sub-divide land for the purposes of building thereon or of sale, if he sells or offers for sale any part of such land whereon a house or other building may be erected , or if he shall form the foundations of a house or other building thereon in such manner and in such position so that such house or other building will or may become one of two or more houses or other buildings erected on such lands.”

³ Local Government Reform: Response to Societal Changes in Jamaica- Economic Development Institute –June 2003

The subdivision approval process is one of the categories of applications that falls under the jurisdiction of the Local Planning Authority as stated in Section 5 of the Local Improvement Act of 1914 which stipulates that, any individual who intends to lay-out or subdivide land for the purpose of creating buildings, must make a submission to the Local Planning Authority.

The Act, under sections 8 and 9 specifically vests the Local Planning Authority (LPA) with the power to sanction subdivision applications subject to prescribed conditions; or refuse to sanction applications subject to necessary alterations.

The applicant is required to submit a map showing the proposed layout or subdivision. That map, prepared by a competent professional must show inter alia;

- The proposed roadways and the division boundaries of the lots;
- The nature of the sewers, water pipes, gas pipes and lighting mains;
- Specifications of how the roadways are to be constructed; and
- The dimensions of the lot(s) etc.

The Planning Departments in the Local Authorities are responsible for processing and the granting of approval or disapproval of subdivision applications. According to the Local Improvement Act, plans are to be sent to the Government Town Planner of the National Environment and Planning Agency (NEPA), the Jamaica Fire Brigade (JFB) and the National Water Commission (NWC) for comments. The LPA must also submit to other agencies (as listed) for their comments⁴. There may be as many as 32 agencies which are required to give their input, depending on the nature of the proposed development. For example, a beachfront hotel near the flight path of an airport would additionally involve the Beach Control Authority, the Civil Aviation Authority, The Coast Guard, The Ministry of Tourism-Tourism Product Development and the Ministry of Agriculture- Fisheries division. By virtue of an amendment in 1959 the expert advice of the Government Town Planner – through the Town Planning Department is also required by the LPA prior to notification of applicants.

The statutory obligation of the LPA is expressed in Section 8 of the Act, which provides for the reasonable assessment of applications, it stipulates that the LPA shall consider the deposits of plans, sections and estimates, and within a reasonable time make a decision on the application. By Section 8(5) of the Act, it is the Minister in charge of Planning however who has the final determination on the

⁴ National Works Agency (NWA) Water Resources Authority (WRA)

Jamaica Bauxite Institute (JBI) Ministry of Agriculture – Rural Physical Planning Division (RPPD) National Irrigation Commission (NIC) National Land Agency (NLA) Office of Disaster Preparedness & Emergency Management (ODPEM) Jamaica National Heritage Trust (JNHT) Mines and Geology Division, Ministry of Health – Environmental Health Unit, Environmental Health Unit, National Water Commission (NWC), Civil Aviation Authority, Urban Development Corporation (UDC)

decision of an application made to the (LPA) as he or she may confirm or disallow the decision of the LPA.

The Jamaican Court of Appeal has examined and interpreted this provision of the Act and declared that in fact it is the Minister who holds the power to grant or refuse the Subdivision Approval upon the recommendation of the LPA.⁵ The LPA's determination of the application is also open to review upon the Applicants appeal to the Minister. The Ministers decision is binding and is not subject to an appeal to any other tribunal.

TCPA

The TCPA deals with the development of land. It encompasses any temporary or permanent change in the use of the land. The meaning of "development" is assigned to its own distinct meaning contained in Section 5 (2) of the Act:

In this Act, unless the context otherwise requires, the expression "development" means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land

This legislation stipulates that in areas for which a Development Order has been prepared, planning permission is required from the Local Planning Authority before "development" as defined by the Act can be undertaken. In those areas for which no development orders have been prepared no planning permission is required to undertake development. The Development Order is therefore the legal document guiding development in Jamaica. These orders are prepared by the Town and Country Planning Authority in consultation with the Local Planning Authority (Parish Councils & KSAC). The Town and Country Planning Authority which is a body established under the Act can "call in" an area for which a development order has been prepared. In this instance the Town and Country Planning Authority has the jurisdiction to oversee all development applications if it so desires within that area. The areas "called in" are Portland Coast, St Mary Coast, Ocho Rios, Negril, and Westmoreland South East Coast.

THE BUILDING ACTS

Construction of buildings in towns and any areas which may be delimited by the Parish Councils (Local Authority) is controlled under this legislation. The Parish Councils/KSAC are allowed to impose suitable conditions with regards to size, elevation, and structural integrity of buildings. To date regulations cover the principal towns of all the parishes. In those areas which have been delimited under

⁵ SCCA 46/98 Garnett Palmer v. Prince Golding et al [20.12. 2000]



the Building Act permission is to be obtained from the (Council/KSAC) before construction commences. The extent of the building area for which permission is required from persons desirous of constructing buildings in the Kingston area is larger than that delimited under the Town and Country Planning Act.

In summary in areas where both the LIA and TCPA occur an applicant needs both a Planning Permission and a Building Permit. A comparison of the functions of the LIA and TCPA two statutes is set out in the following chart:

TOWN & COUNTRY PLANNING ACT	LOCAL IMPROVEMENTS ACT
1a. Defined purpose	1b. Defined purpose
S 5(2) Defines “Development “. Includes all activity required to be approved under the Local Improvements Act and the several Building Acts. Purpose is to give oversight of all development.	Has no definitions of “development” or “improvements” to land. Purpose is to prohibit any building or subdivision improvements to land without prior approval.
2a. Objective of this Statute	2b. Objective of this Statute
Operates when any “development” of land is to take place.	Operates only when land is being built upon or subdivided for sale. S 5 (4)(5) deems when this activity is taking place
3a. Authority over developments	3b. Authority over developments
S12 enables the TCPA to give directions to the Parish Councils requiring any application for permission to develop land or all within a class to be referred instead of being dealt with locally	Parish Councils power is conditional upon directions from the TCPA and the Minister. S 8 (6) & 9 (4) Gives both the Parish Council and the Applicant a right of hearing before the Minister if he proposes not to accept the recommendation or to modify it.
4a. Power to approve applications	4b. Power to approve applications
S.15 confers the power to grant permission for development of land. S.11 delegates power to any Parish Council to receive applications for permission to develop land and to grant permission subject to the Ministers Approval	Contains no inherent power to grant approvals. Power delegated under the TCPA. Councils power only to recommend or refuse approval subject to the final decision of the Minister. Council has no authority to alter the approval after the Minister signs it. <i>See Palmer v Golding.</i>
5a. Court enforcement	5b. Court enforcement
The Supreme Court will enforce TCPA decisions as a civil matter, to order restraining and mandatory injunctions against unauthorized developments.	S. 12 Makes the unapproved land improvement activity a prosecutable criminal offence
6a. Appeals	6b. Appeals

S.13 Gives applicant right of Appeal to the Minister against the TCPA or the Councils decision.	S.15 Gives applicant right of Appeal to the Minister against the Councils decision. Minister's decision is Final.
7a.Pre-development consultation	7b. Pre-development consultation
S.14 allows anyone who proposes to carry out development of land may apply to the TCPA to definitively determine questions on the proposed development.	No provision for any definitive preliminary review of applications. Only indicative advice can be given.

The National Environmental Planning Agency (NEPA) is an umbrella entity which administers the TCPA through a bureau known as the Town Planning Department. The Town Planning Department is an advisory agency of the central Government and advises Local Planning Authorities and the Town & Country Planning Authority on the use of land. It was established in 1950 and its major role is to ensure the orderly and progressive development of both rural and urban areas in Jamaica in order to secure a proper balance between the competing demands for the use of land. The Department only makes recommendations to the LPA and the TCPA. It does not grant permission for developments.

The major functions are:

- Making recommendations to Local Planning Authority on all subdivision applications in Jamaica.
- Making recommendations to Town and Country Planning Authority on development applications in "called in" areas.
- Making recommendations on development applications sent by Local Authorities/KSAC. These are usually major developments.
- Preparing Development Plans from which Development Orders are ultimately prepared for the TCPA. In preparing Development Orders the Department takes physical and social factors into consideration.

4. PROPOSAL FOR AMENDMENTS THROUGH LOCAL GOVERNMENT REFORM

A process of Local Government Reform in Jamaica began in 1993 and may be traced to the response of the Government of Jamaica to the Rio Conference of 1992, and the commitment of the GOJ to the resulting manifesto for increasing local



governance known as Local Agenda 21. Ministry of Local Government, Paper No: 8/93 which initiated the subsequent process stipulated the need to have local governance “which will facilitate maximum participation by all elements of the local community in the management of local affairs”.

Ten years later after detailed review, Ministry Paper 7/2003 confirmed that the local government system had in excess of 100 Statutes, (Acts) and Regulations (Subsidiary Legislation), of which 29 have been identified for immediate amendment. The same ministry paper proposed to initiate national discussions on whether the existing thirteen (13) Local Authorities should be rationalized or consolidated on a regional or other basis. These complexities make it more difficult to assess the impact of the local government reform process to date in increasing the effectiveness of the local authorities in development approval management

There are confidential proposals for the modernization of the planning approval process which seek to update the existing legislation in order to increase the responsiveness of the planning and development approval process to applicants, rationalize the responsibilities and interaction of central agencies with local planning authorities, and streamline the process of development control. The proposals are politically sensitive and are under restricted access.

They involve the amendment of the existing legislation into a consolidated group of enactments to devolve the primary development responsibility into two tiers, one at the local level to the Parish Councils the other to the central agencies under a national development policy framework.

5. TWO TIER DEVELOPMENT APPROVAL CONCEPT ORIGINS

The concept of the Two Tier approach to granting development/subdivision approvals arose from analysis of data which established that approximately 80% of applications received by the LPAs were for either single family residential new construction/extensions, or subdivisions of land into fewer than 10 lots. These were considered to be small and uncomplicated projects relative to the other 20% of applications which were for larger projects of diverse development potential and varying degrees of complexity.

The transition point into the two tiers derived primarily from the provisions of the National Resources Conservation Act which provides that housing developments and sub-divisions of 10 lots and over also require environmental permits from the NRCA/NEPA.

A pilot project to test the feasibility of a two-tier Approval system began in 2001 to provide greater autonomy to the Local Planning Authority in processing

Subdivision applications for 9 lots and under (or for 5 hectares and below), in the St. Catherine and St. Ann Parish Council and the KSAC. This approach was taken to assess the viability of the “two-tier” concept.

The pilot took into consideration the legislative requirements of the Local Improvement Act, which mandates that the Government Town Planner (located in NEPA) and the Chief Executive Officer formerly Chief Technical Director (now located in the National Works Agency (NWA)) are required to comment on all applications for subdivisions, although the approval is given by the Local Authority. Other agencies were also incorporated into the process because of the basic data/information/service vested in their organization and hence their contribution to full and complete processing of the applications.

As part of a continuing Local Government Reform exercise the primary recommendation for a two tier system of development approvals emerged in 2003 following research into the role and functions of the LPA’s (see footnote 3). One of the recommendations of that Report at page 62 under the heading FUNCTIONS OF LOCAL GOVERNMENT AUTHORITIES stipulates as follows:

“Land development and building applications would continue to require the approval of NEPA. NEPA would, however, delegate to the local authorities the power to approve certain types of building applications (e.g. single-storey dwellings, extensions etc.) in conformity with the relevant development orders and building codes and subject to the appropriate guidelines.”

6. RECOMMENDED LPA APPROVALS PROCESS CHANGES, PERCEPTIONS OF IMPEDIMENTS

Following a series of evaluations in the pilot project to test the feasibility of the two-tier Approval system a list of Recommendations, Targeted Objectives and Essential Changes was determined. The likely resistance to their implementation was also assessed. The results are detailed below;

- ☉The institution of an optional but recommended pre-consultation meeting
- ☉The institution of a mandatory preliminary review
- ☉The institution of an Internal Review Committee
- ☉The removal of the need to obtain confirmation from the Minister
- ☉The integration of a web based tracking and documenting system
- ☉Establishing deadlines for receiving applications, and establishing set dates for Internal Review Committee and Physical Planning and Environment Committee meeting

Targeted Objectives

- ⊙ Reduction of the time taken to fully process applications; to 60-90 days
- ⊙ Standardized system for all Councils
- ⊙ Easier Tracking of applications
- ⊙ Greater customer satisfaction

Expected Challenges to the Two Tier System

- ⊙ Resistance of the LPA staff to change
- ⊙ Limited LPA staff resources, impeding the implementation of the process
- ⊙ Lengthy Legislative Amendments.

7. COURT DECISIONS PRESCRIBING THE LEGAL OBLIGATIONS DUE TO APPLICANTS

It is axiomatic that even if the LPA staff resources were adequate and the necessary legislative Amendments were made to entrench the “two tier” system, if the resistance of the LPA staff to change remains then the targeted objectives of the “two tier” system would not be realized.

An empirical analysis of the development approval application process was conducted in 2009 by KPMG. It confirmed that a significant factor affecting the inefficiencies manifested was the human factor in the various agencies participating in the process and the absence of any full appreciation of the duty owed to the applicants.

The need for legislative amendments to the statutes governing the development approvals process is accepted. Of significance is the fact that there are no statutory provisions upon which an applicant may rely to enforce timely discharge of the statutory duty by a regulatory agency.

The importance and effect of having statutory provisions that circumscribe the obligation of a development approving agency to deliver its decision in a timely manner was demonstrated in the case of *Edwick v Sunbury-On-Thames Urban District Council and Another*⁶. The case considered issues of;

- Town and Country Planning
- Permission for development
- Notification of decision by local planning authority

⁶ (1961)-3 All ER 10)

- Notice of refusal not given within time set in General Development Order
- Mandatory requirements
- Enforcement notice given before application for development permission – Notice void or invalidated
- Town and Country Planning Act, 1947 (10 & 11 Geo 6 c 51), s 23(3)

In summary, the facts of the case are as follows;

Prior to 16 August 1957, Edwick, the plaintiff had been using land which he owned for the display and sale of motor cars without planning permission. On that date the local planning authority served an enforcement notice on the plaintiff requiring him to discontinue the using the land for those purposes. On 10 September 1957, Edwick applied for permission to continue the use of the land for the display and sale of motor cars and, accordingly, under s 23(3)(a) of the Town and Country Planning Act, 1947, the enforcement notice which had been served on him became ineffective until the final determination of the application. By s 18(1) of the Town and Country Planning Act, 1947, an application to continue any use of land is an application for “permission to develop land” within s 14(3). In all too familiar fashion the local planning authority took no steps regarding Edwick’s application until, more than two years later. Then by notice dated 7 January 1960, they purported to refuse the application. Edwick’s asked the Court to enquire into the interpretation of the statute and find that the notice of 7 January was void as it was not given within the period allowed by Article 5b of the Town and Country Planning General Development Order, 1950, and that, accordingly, the enforcement notice was of no effect.

The Court held that words of S. 5(8) of the General Development Order of 1950 was mandatory, not merely directory, and as the local planning authority had failed to notify the plaintiff of their decision within the period allowed by S.5(8), the notice of refusal dated 7 January 1960, was void and, therefore, the enforcement notice was no longer valid. What is instructive is that this decision by the Court, interpreting the statute, was made fifty years ago and that the statute involved is almost identical to our own Town and Country Planning Act.

There is a culture among prospective developers in Jamaica of not relying on the law to challenge development approval agencies to deal with applications in a reasonable time or the prescribed time but instead the applicants resort to trying to find a way to “get through” in spite of the delay. This may well be due to the problem of the tightly budgeted resources to finance the development making it uneconomic to pursue litigation or the economic cost of the delay making that option suicidal to the project.

That culture is thankfully not reflected elsewhere in the English speaking Caribbean where applicants have directly challenged regulatory authorities to act with integrity. This was demonstrated in the audacious case of *Camacho And*

*Sons Ltd & Others v Collector Of Customs*⁷. This case re-examined centuries old principles of law which defined the circumstances in which such words as “*may*” and “*it shall be lawful*” appearing in a statute may be construed. The Courts decision confirmed that wherever such words appeared they imposed a duty upon the affected regulatory entity to act concisely.

That statutory duty of a regulatory entity to act in a particular manner was clearly stated in *Julius v Bishop of Oxford*⁸, (as follows;

‘...Where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised.’

The more important statement of the intent and interpretation of a statute which prescribes the obtaining of regulatory approval was encapsulated in these words from that decision;

“The enabling words are construed as compulsory whenever the object of the power is to effect a legal right.”

In essence therefore it is an established legal principle of English Common Law in interpretation of statutes, that where a regulatory authority is mandated to receive and consider applications for approval of any activity which the applicant has a legal right to conduct, that regulatory authority may not treat with that application in an indifferent or inefficient manner as the power given to that authority by its enabling statute is circumscribed by an obligation not to unduly delay or avoid the making of the required decision as to do so infringes upon the legal right of the applicant to have a decision made.

The legal implications of the failure of a regulatory authority to make a decision upon an application it had received for approval and to inform the applicant in a timely manner was examined in the case of *Re Kerr and Township of Brock, et al*⁹.

The facts of that case were that a landowner applying for a building permit was informed that her application was regular in every way but that the inspector had

⁷ (COURT OF APPEAL OF THE WEST INDIES ASSOCIATED STATES- DECEMBER 1971.

⁸ (1880), 5 AC 214 (1874-1880) All ER Rep 43

⁹ (1968), 69 DLR (2d) 644).

been instructed not to issue building permits at all in cases such as hers because of a recently enacted by-law. The court, on an application for mandamus, declared the by-law invalid and directed the municipality to issue the permit. It will readily be seen that the circumstances of this case are entirely different from the norm. Here, the regulatory authority never considered the applications on their merits and the Court found it had no evidence to say that it ought to have granted the approvals

That decision however runs parallel to the Courts decision in *Camacho And Sons Ltd & Others v Collector Of Customs* because in that case the decision of the Controller to refuse the application in the circumstances of the case amounted to a failure to exercise his discretion and a breach of a statutory duty to act in good faith and in accordance with the empowering statutes provisions and there was no liberty to refuse the applications on grounds which are arbitrary or capricious nor to take account of irrelevant or extraneous consideration.

Those principles were followed in the Caribbean case of *Attorney-General v Lopinot Limestone Ltd*¹⁰.

The action was against the State for Judicial review of a Government Minister's decision. The case considered a range of about twenty important legal issues and principles such as;

1. Ouster of court's jurisdiction
2. Finality of a Minister's decision
3. Availability of judicial review
4. Town and Country Planning Act, Ch 35:01 [T], section 11(3),
5. Natural justice
6. Legitimate expectation
7. Expectation of opportunity to amplify case
8. Undertaking to provide opportunity
9. Disappointment of legitimate expectation,
10. Breach of rules
11. Waiver of breach
12. Inability of party benefiting or judge to waive breach
13. Procedural defect in reaching planning decision,
14. Acts of public official
15. Presumption of regularity (omnia praesumuntur rite esse acta)
16. Town and country planning & Planning applications
17. Decision on applications
18. Time in which decision must be notified
19. Whether provision as to time mandatory or directory
20. Town and Country planning (General Development) Order

¹⁰ (1983) 34 WIR 299 by the COURT OF APPEAL OF TRINIDAD AND TOBAGO Delivered on April 12, 1984

A summary of the case is as follows;

A company applied to the Minister of Finance for planning permission to work a quarry on a specified site in November 1978. An agent of the company made several visits to representatives of the Minister who led him to believe that they would be responsible for advising the Minister on the application. Also, they indicated that they would visit the site at a future date. No such visit took place and in May 1980 the Minister formally refused permission. The company applied to the High Court for a declaration that the Minister's decision entitled it to compensation under the Town and Country Planning Act or, alternatively, that the Minister's decision was in breach of the principles of natural justice. At the hearing the trial judge (at the request of the company) dealt first with the issue of compensation and concluded that the company was entitled to an award; he ordered compensation to be assessed by a judge in chambers. He then considered the issue of the breach of the rules of natural justice and held that the Minister had acted in breach of those rules. The Attorney-General appealed to the Court of Appeal.

The Court in allowing the appeal established an interpretation of the statute that although the Town and Country Planning Act stated that the Minister's decision on a planning application was final, this provision did not exclude the right of the Court to inquire into an allegation of a breach of the rules of natural justice by the Minister in reaching that decision. In applying that principle of natural justice the Court further ruled that the company had a legitimate or reasonable expectation that the Minister would fulfill the undertaking given on his behalf that the site would be visited and that the company would on that occasion be able to answer any queries etc. regarding its planning application; Its legitimate expectation had been disappointed and for that reason and for the breach of the *audi alteram partem* rule (*the right to be heard*) the trial judge had correctly ruled that there had been a breach of natural justice; this breach rendered the Minister's decision void and of no effect.

The decision of the Court of Appeal in *Attorney-General v Lopinot Limestone Ltd* was affirmed by the Judicial Committee of the Privy Council on 29th July 1987 **and is now the substantive Common Law rule** for the British Commonwealth of nations

In arriving at its decision the Judicial Committee confirmed the correctness of the law applied in *Edwick v Sunbury-on-Thames Urban District Council* and brought into focus the importance of principles of natural justice and legitimate expectation when an applicant submits to a statutory approval process.

Those principles had been carefully examined in a recent decision the Privy Council had made in *Attorney-General of Hong Kong v Ng Yuen Shiu*¹¹.

The Privy Council confirmed the principle of law that “a public authority was bound by its undertakings as to the procedure it would follow, provided those undertakings did not conflict with its statutory duty”.

It affirmed the natural justice principle that a person was entitled to a fair hearing before a decision adversely affecting his interests was made by a public official or body if he had a legitimate or reasonable expectation of being accorded such a hearing and that such an expectation might be based on some statement or undertaking by, or on behalf of, the public authority which had the duty of making the decision if the authority had, through its officers, acted in a way which would make it unfair or inconsistent with good administration to deny the person affected an inquiry into his case.

The question of natural justice raises the issue of whether or not a statutory approval agency should afford an applicant an opportunity to be heard before making a decision to reject his application where he has effectively complied with all the requirements for its proper consideration. **This obligation has been defined in law as the “duty to consult”.**

A duty to consult can arise in essentially three ways: first, there might be a specific statutory requirement to consult; secondly, a legitimate expectation of consultation might arise; and thirdly, the decision-maker might have assumed a duty to consult.

The basis for a legitimate expectation of consultation was confirmed in *R (on the application of Abdi) v Secretary of State for the Home Department*¹²:

The Court stated the law in these terms.

“Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honored unless there is a good reason not to do so”

As will be discussed below, irrespective of whether there is a statutory duty to consult or a legitimate expectation of consultation has been raised, if a statutory decision-maker has determined that it is going to undertake consultation as part of the process of exercising a power, the consultation must be undertaken properly. The voluntary undertaking of such consultation has been said to be “a very

¹¹ [1983] 2 AC 629, [1983] 2 All ER 346, [1983] 2 WLR 735, PC

¹² [2005] EWCA Civ 1363 at [68]

desirable part of the ordinary processes of government”

The requirements for proper consultation were summarized by Lord Woolf MR in *R v North and East Devon Health Authority; Ex parte Coughlan*¹³ to be four essential points;

“It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken”

Consultation is a means of improving access to information and public participation in decision-making. It can enhance the quality of decisions, contribute to public awareness of issues addressed, provide the public opportunity to express its concerns and enable public authorities to take due account of such concerns. As such, consultation is an aspect of the procedural propriety of administrative decision-making.

Courts, in enforcing duties to consult, where they arise, exercise a truly supervisory jurisdiction. Enforcing a duty to consult does not interfere with the substance or merits of a decision, only the process by which it was reached.

8. CONCLUSIONS

The conclusions derived from the cases examined which are pellucidly obvious is that the Courts have determined the law and established that the wide discretion given to a regulatory authority by any statute does not include a power to act otherwise than in accordance with the rights and duties defined by common law.

The fundamental elements of the rights and duties impose an administrative responsibility upon the agencies which process development approval applications to ensure that they;

1. Deal with applications fairly and impartially
2. Afford opportunity to the applicant for consultation
3. Do not deal with the application in an indifferent or inefficient manner

¹³ [2001] QB 213

4. Deal with the application in a reasonable time and notify the decision
5. Deal with the application in good faith and in accordance with the empowering statutes provisions
6. Avoid taking account of irrelevant or extraneous considerations for the application
7. Avoid denying the applicants legitimate or reasonable expectation
8. Do not breach the rules of natural justice in the right to be heard on any issue that may cause the application to be rejected
9. Do not abuse the scope of the given authority by a perverse decision based on a failure to consult, undue delay or onerous requirements designed to frustrate the application.

9. RECOMMENDATIONS

A simple recommendation emits from the law examined and the ineluctable conclusions. To overcome the **Expected Challenges to the Two Tier System - in the Resistance of the LPA staff to change** (page 7 supra), there should be a special administrative education program within regulatory or development approval agencies which receive applications to make them aware that;

- A. In law there is a statutory and common law duty owed by them to applicants
- B. There are nine standards of that duty
- C. That setting official policy guidelines for timely performance of the statutory approval functions involves these nine duty standards
- D. That if the agency fails any one of these standards it would be in breach of its own statutory obligation and infringe upon the legal rights of the applicant.

The inescapable result of this administrative education program is that institutional capacity for administration would be strengthened by it, as first improving the human element is vital to any planned improvement of any administrative process.

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