IN THE PLANNING APPEALS TRIBUNAL
IN THE MATTER OF SECTION 49 OF THE DEVELOPMENT AND PLANNING ACT (2021 REVISION)
AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE CENTRAL PLANNING AUTHORITY WHEREBY PLANNING PERMISSION WAS GRANTED WITH RESPECT TO REGISTRATION SECTION LITTLE CAYMAN BLOCK 86A PARCEL 18 & 20.
PLA/DCB/22/01

BETWEEN

DAPHNE HACKLEY JOHNSON BERGER
ZACHARY H. JOHNSON
JOHN JOHNSON (deceased)

APPELLANTS

AND

THE DEVELOPMENT CONTROL BOARD

1ST RESPONDENT

PEPPERCORN INVESTMENTS LIMITED

2ND RESPONDENT

CORAM: Magistrate Kirsty-Ann Gunn (Chair)
L. Kendal (Kenny) Ryan
Robert Banks

Appearances: Miss Kate McClymont of Nelson & Co for the 1st Appellant
Miss Celia Middleton of the Solicitor-General's Chambers for the 1st Respondent
Mr Michael Alberga of Travers Thorp Alberga for the 2nd Respondent

Also present: Heron Pandohi (Director of Planning)
Andrea Stephens (Planning Officer) (by Zoom)

Date of hearing: 22 September 2022

Date of decision: 19 October 2022

JUDGMENT

1. This is an appeal against the decision of the 1st Respondent, the Development Control Board ("DCB"), made on 13 January 2022 to grant the 2nd Respondent, Peppercorn Investments Ltd ("Peppercorn"), planning permission for a beach resort and wellness centre on Little Cayman Block 86A Parcels 18 & 20 ("the Decision"). The Appellants were one of the original objectors to the planning application.

The Law Governing The Proceedings

2. This tribunal is governed by section 49 of the Development and Planning Act (2021 Revision) which provides that the tribunal shall hear appeals from the decisions of the Development Control Board ("the DCB"). The four grounds of appeal are that the decision of the DCB is -
    (a) Erroneous in law;
    (b) Unreasonable;
    (c) Contrary to the principles of natural justice; or
    (d) At variance with a development plan having effect in relation thereto.

3. The appeal process is governed by the Development and Planning (Appeals) Rules (1999 Revision).

The Appellants

4. At the time of the application, Ms Daphne Hackley Johnson Berger, Mr Zachary H. Johnson and Mr John Johnson were joint owners 70 Wonder Lane, a neighbouring property to the proposed development. Ms Johnson Berger objected on behalf of her co-owners to Peppercorn's application for planning permission. There were other objectors to the project but the Johnsons are the only objectors to have sought to appeal the grant of planning permission. We have been advised that since the appeal was filed, Mr John Johnson has passed away. Miss McClymont represents the remaining two appellants. Only Ms Daphne Johnson Berger attended the appeal hearing (via Zoom).

The Respondents

5. The 1st Respondents are the DCB which made the Decision and is represented by Crown Counsel Miss Middleton. Mr Alberga represents the 2nd Respondent, Peppercorn, who are the developers who were granted planning permission. Mr Alberga adopted all submissions made by Miss Middleton.

The Development

6. When the application was first filed with the Planning Department on 7 July 2021 the proposal called for a landside hotel consisting of 12 two-bedroom and 6 three-bedroom houses, a reception building and wellness spa, restaurant, beach bar, 7 pools, a kitchen and other thatched pavilions and huts as well as 19 overwater bungalows. The overwater element of the development would encroach into a designated marine conservation park. Peppercorn only sought planning permission for the landside portion of the development, opining that the overwater portion would require a coastal works licence from Cabinet. On 1 August 2021 there was a meeting between the Department of Environment ("DoE"), The Ministry of Planning ("Planning") and Crown Counsel from the Solicitor-General's Chambers to review the application. The representatives at this meeting concluded that Peppercorn would have to obtain planning permission from the DCB for the entire project. This was communicated to Peppercorn on 20 August 2021. On 20 September 2021 Peppercorn resubmitted plans to Planning omitting the overwater bungalows. As a result, the DCB only had the application for the landside component of the development before it. The status of the coastal works application was unknown at the time of the appeal hearing. The development of the landside portion would be within 500 feet of the coast and border a marine conservation park.

The Director of Environment's Position

7. It was held in **National Conservation Council v Central Planning Authority** the NCC is empowered to delegate its powers to the Director of Environment ("Director") pursuant to section 3(13) of the NCA. The Director is then authorised to make recommendations, impose conditions and refuse approval on behalf of the NCC.

8. The Director in her memorandum of 25 October 2021 ("the Memorandum") set out in quite some details her reservations about the Peppercorn project. She repeatedly aired her view that the coastal works application should be determined first before the DCB considers the development as a whole, including the overwater bungalows. However, the Director proceeded to consider the landside development in isolation as this was what was before the DCB at the time. She summed up her conclusions thus –

"The DoE maintains its position that the principle of the acceptability of the overwater bungalows should first be established through Cabinet's determination of the coastal works application. Should Cabinet be minded to grant approval, the in-water and land-based components should be screened for an EIA. In advance of this determination the planning application should be held in abeyance.

Therefore, 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), and on the basis of the above information, under section 41(5)(a) of the NCA, the Director of DoE therefore ***respectfully directs that the following conditions be imposed*** *by the Development Control Board or Department of Planning, as part of any agreed proposed action for planning approval:*

(a) All construction materials shall be stockpiled a minimum of 50 ft. from the Apparent High Water Wash Line.

This condition is directed to prevent run-off and debris from entering the Marine Protected Area causing turbidity and impacting sensitive marine resources.

Additionally, it is ***recommended*** *that the DCB require the following conditions of approval should planning permission be granted:*

(a) A walkover survey shall be conducted, as agreed by the DoE, prior to commencing works on-site to ensure that no iguanas or nests are present.

(b) There shall be no mechanical clearing, heavy equipment, construction work or stockpiling of construction materials outside of the parcel boundaries.

(c) There shall be no construction work which involves excavation, filling or laying of foundations from 1 May – 1st September to avoid crushing or causing harm to nesting iguanas and their nests.

(d) Any sand excavated during construction works shall remain on-site.

(e) Any cats, dogs or pets on the property shall be contained or leased at all times to avoid causing inadvertent harm to iguanas."

The Decision

9. The minutes of the DCB's meeting on 13 January 2022 record the DCB's decision:

"It was resolved to grant planning permission subject to the following:

Conditions (1-12) listed below shall be met before permit drawings can be submitted to the Department of Planning.

1. *The applicant shall submit a revised site plan showing:*

a) *parallel or slanted parking Wonder Lane;*

b) *a minimum 49 parking spaces measuring 8 ½ ft x 16 ft; and*

c) *all parking areas surfaced with pavers of the sound/natural.*

2. *A walkover survey shall be conducted, as agreed by the DoE, prior to commencing works on site to ensure that no iguanas or nests are present.*
3. *The construction drawings for the proposed swimming pool shall be submitted to the Department of Environmental Health. The applicant shall also submit to the Director of Planning requisite signed certificate certifying that if the pool is constructed in accordance with the submitted plans it will conform to public health requirements.*
4. *The applicant shall submit a stormwater management plan designed in accordance with the requirements of the National Roads Authority (NRA) and approved by the Development Control Board. The applicant should liaise directly with the NRA in submitting the stormwater management plan.*
5. *Construction drawings for the proposed wastewater treatment system and disposal system shall be submitted to the Water Authority for review and approval. The Development Control Board must receive confirmation of the Water Authority's approval.*
6. *The applicant shall submit a landscape plan which shall be subject to review and approval by the Development Control Board. It is suggested that the landscape plan be prepared following the recommendations of the draft Cayman Islands Landscape Guidelines, found on the Planning*

Department's website [www.planning.ky] under Policy Development, Policy Drafts.

7. *The applicant shall submit construction operations plan to the satisfaction of the Development Control Board indicating in sufficient detail how the development will be constructed without interfering with or obstructing adjacent roads, properties and fire lanes. At a minimum, the plan shall indicate the location of material storage, workers parking, site office, portable toilets, construction fencing and where applicable, the stockpiling of material excavated from the site and material brought to the site for fill purposes. If the subject site is on the sea, the plan shall include notes indicating that there shall be no construction work which involves excavation, filling or laying the foundations from 1st May – 1st September to avoid crushing or causing harm to nesting iguanas and their nests.*
8. *The applicant is required to apply for Permit from the Director of Planning. Construction shall not commence prior to the issuance of a Permit.*
9. *Unless specifically authorized otherwise in writing by the Development Control Board, the development shall be carried out strictly in accordance with the approved plans which you will receive when all the above conditions are complied with.*
10. *All construction materials shall be stockpiled a minimum 50 ft from the Apparent High Water Wash Line.*
11. *Any sand excavated during the construction works shall remain on-site.*
12. *All required inspections shall be conducted and approved prior to occupancy of the structure.*

    The applicant will be advised that this approval is in effect for five (5) years only and will expire if the applicant does not receive approval to commence construction regarding conditions 1 – 12 above during this time. If the applicant wishes to reinstate the approval after this period, he/she may make a new application to the Department of Planning, which will be subject to payment of the required fees."

10. The same minutes also record the reasons for the DCB's decision:

> *"1. The proposed development complies with the typical planning parameters required by the Development Control Board as guided by the Development and Planning Regulations (2021 Revision), and Appendix 2 of the Development Plan 1997.*
> 2. *The objectives did not raise any material planning considerations that could not reasonably be mitigated by the imposition of conditions on the grant of planning permission, and so do not warrant the refusal of planning permission.*
> 3. *The proposed development is compatible with existing land uses in the immediate area.*
> 4. *Construction operations plan to the satisfaction of the Development Control Board is required, indicating, in sufficient detail, how the development will be constructed without interfering with or obstructing adjacent roads, properties and fire lanes.*
> 5. *The Fire Service has stamped approved the site plan for site access.*
> 6. *Department of Environmental Health has recommended approval with conditions.*
> 7. *Recommendations of the Department of Environment have been considered and conditions of approval imposed as deemed appropriate by the Board.*
> 8. *The Water Authority has reviewed the application and submitted comments. The applicant will be required to comply with all Water Authority requirements.*
> 9. *The Board considered concerns about parking by an objector. The objector expressed concern that the development would have an overabundance of parking spaces if more parking was added. The Board confirmed that the application is indeed a resort, therefore 49 parking spaces are required. The Board considered the objectors representation in this regard and determined that a reduction in the number of parking spaces would have the potential to have a deleterious impact on the*

operations of the project and a material impact the amenity of the area. The Board also determined that the objector failed to present any cogent reasons in support of their view that that the project as presented represented an overabundance of parking spaces.

10. *The Board considered concerns from another objector concerning odors emitting from the sewage disposal. The Department of Environmental Health on the Water Authority regulate this and imposed suitable conditions in this regard.*
11. *The Board considered an objector's concerns about the height of the reception/administration building which has a wellness spa. The Board decided that the proposed height of the building was not unreasonable after careful consideration of the proposed elevations within the context of the surrounding environs. The Board also determined that the objector failed to provide persuasive argument and any supporting evidence that the proposed building heights would have a detrimental impact on the objector's property."*

11. Following a request by the Chairperson of the Appeal Tribunal for written reasons, the DCB produced those written reasons on 12 May 2022. The reasons matched almost word for word the reasons set out in the minutes of 13 January 2022. The conditions provided on the later occasion omit condition 11 which references that excavated sand shall be kept on site, however, this may simply be a "copy and paste error" as condition 10 (All construction materials shall be stockpiled a minimum 50 ft from the Apparent High Water Wash Line) appears twice in the list. We will return to the issue of reasons in due course.

Grounds of appeal

12. The Appellants appeal against the Decision on 3 grounds. Miss McClymont submitted that:

    (i) The Decision was made in breach of natural justice

    (ii) The DCB made an error of law; and/or

    (iii) The Decision is unreasonable

The Law

13. The DCB's powers derive from section 14 of the Development and Planning Act ("DPA") –

> *"There is hereby conferred exclusively upon the Board in relation only to Cayman Brac and Little Cayman the functions and powers (which but for the section would be exercisable or enjoyable by the Authority) provided by section 15…"*

14. Section 15 provides that –

> *"(1) Subject to this section and section 5(1), where application is made to the [Board] for outline planning or permission to develop land or permission for a planned area development, the [Board] may grant permission either unconditionally or subject to such conditions as it thinks fit, or may refuse permission.*
> *(2) Without restricting the generality of subsection (1), conditions may be imposed on the grants of permission to develop land thereunder –*
>
> > *(a) for regulating the development or use of any land under the control of the applicant (being land contiguous to the land that is the subject of the application) and for requiring the carrying out of works on any such land, so far as it appears to the [Board] to be expedient for the purposes of or in connection with the development authorised by the permission; and*
> > *(b) for requiring the removal of any building or works authorised by the permission or the discontinuance of any use of land so authorised, at the expiration of a specific period, and the carrying out of any works required for the reinstatement of land at the expiration of that period,*

And permission granted subject to any such conditions as is mentioned in paragraph (b) is, in this Act, referred to as permission granted for a limited period only.

…"

15. Section 5 of the DPA imposes an obligation on the Board to cooperate with other government entities –

"The Authority or Board, as the case may be, shall, to the greatest possible extent consistent with the performance of its duties under this Act, consult with departments and agencies of the Government having duties or having aims or objectives related to those of the Authority or Board."

16. Section 41 of the National Conservation Act 2013 ("the NCA") provides that –

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

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

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

(4) Every entity, except Cabinet, in accordance with any guidance notes issued by the Council and regulations made under this little, shall apply full and obtain the approval of the Council before taking any action including the grant of any permit or license 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 crucial habitat of a protected species.

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

(a) agreed 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 say direct the originating authority and that authority shall refuse to agree to or refuse to proceed with the proposed action.

(6) Any person aggrieved by decision of the Council under this section may appeal against it to the Cabinet in accordance with section 39."

17. The NCA defines an "entity" to mean "*any body of government and includes the Cabinet, any ministry, portfolio, statutory authority, government company or any other body which exercises a public function*".

18. Walters Actg J in **National Conservation Council v the Central Planning Authority (G 207 of 2021)** held that the Central Planning Authority, which adjudicates on planning applications in Grand Cayman, is an "entity" as prescribed by the NCA and, therefore, it must comply with the NCA. Consequently, mutatis mutandis the DCB is also an entity and bound to adhere to the NCA.

19. Section 43 of the NCA speaks to the requirements of environmental impact assessments ("EIA") –

"(1) In any consultations pursuant to section 41(3) or before granting an approval under section 41 (4), the Council may, in its discretion and within such times as it may specify, require an environmental impact assessment to be carried out of the proposed action."

20. The EIA directive was published in the Cayman Islands Gazette on 29 June 2016 (Extraordinary No 50/2016). Directive 1 provides that –

    - An EIA can be initiated by the National Conservation Council under section 41(3) or 41(4).
    - A proponent may initiate EIA discussions with the Council prior to the formal submission of an application for approval.
    - In both instances the process specified hereafter will be used.
    - The proponent may or may not wish to request a Screening Option.
    - In all cases the costs of the EIA and the monitoring of any subsequently permitted activities shall be the responsibility of the project proponent (34(4)).

21. Directive 2 states that –

    "All activities listed in Schedule 1 will be considered against the screening criteria listed in section 1 to 3 of Schedule 1 to determine if an EIA may be required. The requirement for an EIA will be triggered by the type and characteristic of development, locational considerations and the characteristics of the potential impact…

22. Schedule 1 lists "hotel and resort developments" as one of the activities that shall be considered against the screening criteria.

Breach of Natural Justice

23. As stated above, Peppercorn's original application in July 2021 concerned both landside and overwater elements. By September 2021 Peppercorn had amended their plans to remove all overwater elements. The Appellants complain that they were never notified of the change of plans and so did not have the opportunity to comment on the new plans. Miss McClymont submits that the Appellants should have been notified of the change and possibly that new

notices should have been delivered to the affected persons and notices published in the local newspapers.

24. During the course of the hearing Miss Middleton, with leave of the tribunal, submitted an email sent by Andrea Stevens, Secretary to the DCB, to Ms Johnson Berger on 23 September 2021 stating –

> *"Hi Ms. Daphne,*
> *The Planning Department has received your letter of objection to the application submitted by the Peppercorn Investments Ltd. for a proposed development at Block 86A Parcels 18 & 20 in Little Cayman. The application has been amended; the overwater units have been removed from the application. Could you please let me know if you would like to proceed with your objection? Would you like to review the application again? Please let me know at your earliest convenience.*
> *I look forward to hearing from you.*
> *Kind regards*
> *Andrea L. Stevens*
> *Planning Officer"*

25. We are informed that similar emails were sent to all objectors.

26. This email having now been brought to Ms Johnson Berger's attention she checked her inbox and discovered that she had in fact received the above email in September 2021 but that she had failed to read the content. She conceded that she had been notified of the change of the plans and had failed to respond. Miss McClymont avers that an email is insufficient and that fresh notices should have been issued. She said there was nothing said at the December 2021 and January 2022 DCB meetings that would have put Ms Johnson Berger on notice that the plans no longer included the overwater bungalows. However, Miss McClymont has not been able to identify any provisions in the DPA or the Regulations which require fresh notices to be issued when there is a change, even a material change, in the planning application. Miss Middleton pointed out that the DCB's agenda was published on the Planning website and available for review prior to even the December hearing and argued that, in the absence of express statutory provisions requiring new notices, the emails to objectors meet the requirements of natural justice.

27. It is evident from the minutes of the meeting in December and January that all letters of objection, including that of Ms Johnson Berger, were considered and that Ms Johnson Berger was given the opportunity and did in fact make oral submissions to the DCB in January 2022. Miss McClymont has not proposed that Miss Johnson Berger's submissions would have been any different had she known about the change: Miss Johnson Berger did make her objections about both parts of the project known. It is apparent from the Minutes of January's meeting and the subsequent "reasons for decision" that the DCB took Ms Johnson Berger's objections into consideration where they related to the landside development. Consequently, we find no basis for concluding that Ms Johnson Berger was in any way prejudiced by her failure to read the email. We find that the DCB acted reasonably by publishing the agenda ahead of time and sending out notices to those persons who registered objections to the original plans and that it is Ms Johnson Berger's oversight that has caused her to feel aggrieved, rather than a failure by the DCB to follow procedure. We are satisfied that the rules of natural justice were not breached in this instance and that ground of appeal is dismissed.

Error in Law

28. The Appellants submitted that the DCB made 4 errors of law –

    (i) The DCB failed to comply with section 43 NCA and the EIA directive by not ordering an EIA.
    (ii) The DCB failed to refer the matter to the NCC under section 41(4) for consultation.
    (iii) The DCB failed to apply 2 of the NCC/DoE's recommendations which were directed at the protection of the Sister Island Rock Iguanas ("SIRIs").
    (iv) The DCB did not give adequate reasons for
        (a) not applying the 2 NCC/DoE recommendations concerning the SIRIs.
        (b) Not referring the matter to the NCC pursuant to 41(4) NCA for consultation.

29. With respect to EIAs, the Appellants argue that because the SIRIs are protected species under the NCA (Schedule 1 part 1) and the site in question is a known nesting habitat of the SIRI (see

the Memorandum) that this imposed a duty of the DCB to commission an EIA before they could consider the application. Miss McClymont drew our attention to section 43 of the NCA in support of her contention. Miss Middleton did not address us on this particular point.

30. We find that we do not agree with the Appellants' interpretation of section 43. The section states that –

> *"[i]n any consultation… or before granting approval … the Council may, in its discretion … require an environmental impact assessment to be carried out …" (emphasis added).*

31. This unequivocally empowers the NCC to order EIAs at their discretion, but there is nothing within the NCA or other legislation which requires the DCB or any other entity to commission EIAs before making decisions impacting protected habitat or species. The Directives speak to entities initiating discussions with the NCC about an EIA but ultimately even the Directives consider the final determination to rest with the NCC. We are satisfied that the legislation and Directives leave it entirely to the NCC to determine whether an EIA is necessary by applying the EIA directives.

32. It is evident from the Memorandum from the Director (purporting to act on behalf of the NCC) that, while an EIA would have been recommended had a coastal works licence been issued for the overwater bungalows, the Director did not direct an EIA be commissioned for the purposes of determining the landside development which was the sole issue before the DCB, instead choosing to give directions and make recommendations. It would have been entirely within the Director's discretion to order an EIA or refuse approval altogether had she felt this was necessary, but she declined to do so. Consequently, the Appellants' first alleged "error" is without merit.

33. Next we turn to the question of consultation. The Appellants submit that because the development was likely to affect the nesting habitat of the SIRI, a protected species, and is adjacent to a marine conservation park, the DCB should have referred the matter to the NCC for consultation pursuant to section 41(4).

34. Pursuant to section 7 of the DPA, the DCB are obligated to consult with such departments and agencies of the Government which have duties, aims or objectives which relate to the functioning of the Board. Section 41(3) provides that every government entity "*shall in accordance with any guidance notes issued by the Council, consult the Council and take into account any views of the Council before making any decision … that would or would be likely to have an adverse effect on the environment generally or on any natural resources*".

35. Walters J in **National Conservation Council v Central Planning Authority** held that the NCC's guidance to entities issued pursuant to section 3(12)(i) of the NCA is binding on entities and they must comply with same. The guidance states amongst other things that -

> "To comply with the Law all government entities shall consult with the Council if they are taking any action, granting any permission, taking any decision or giving or engaging in any undertaking which matches the following 'trigger' conditions.
>
> A) Location Triggers are (as shown on Screening Map):
>
> i) Activities occurring on the coast; i.e. within 500 feet landward of the high watermark and activities occurring on land parcels with canal frontage
>
> ii) Activities occurring seaward of the high water mark
>
> iii) Activities in areas of primary habitat or critical habitat (as defined in a Conservation Plan)
>
> iv) Activities in or adjacent to a protected area."

The guidance also provides for activity and strategic triggers, however, we need not rehearse those for this particular review.

36. What is apparent from the material before us is that the Peppercorn development was proposing to develop land within 500 feet of the coast and is adjacent to a protected area (namely a marine conservation park). Consequently, the DCB were bound by the NCC guidance to consult the NCC before taking any decision. The Director in her Memorandum purported to be acting under her delegated powers which means that the NCC was, through her, consulted in accordance with section 7 of the DPA, the NCC guidance and section 41(3) of the NCA.

37. Section 41(4) of the NCC requires all government entities (except Cabinet) to *"apply for and obtain the approval of the NCC before taking any action … 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."*

38. Walters J set out the process applicable once the initial consultation has taken place at paragraph 62 of his judgment –

> *"…Assuming that consultation takes place under s.41(3) in accordance with the Guidance it seems to me that the process under s.41 will work as follows:*
>
> *62.1* *After consultation under section 41(3), has the NCC expressed any view about the consequences of the proposed action by the entity?*
>
> *62.2* *If no, that is the end of the matter.*
>
> *62.3* *If yes, and the NCC expresses the view that the giving of any undertaking or approval would or would likely to have an adverse effect on the environment generally and the proposed action does not involve a protected area or the critical habitat of a protected species, then the entity should consider what the NCC says but it is not binding. At this stage, based on the response from the NCC, entities such as the CPA might choose to impose related conditions as it thinks fit on a grant of planning permission.*
>
> *62.4* *If yes, and the NCC expresses the view that the giving of any undertaking or approval would or would likely to have an adverse effect on a protected area or the critical habitat of a protected species, then there appears to be no option but to apply to the NCC under s.41(4). In my view, at that point the only question for the relevant entity is whether the NCC has expressed the relevant view. If it has, then an application under s.41(4) is mandatory. It is not a case of the NCC having to engage with the relevant entity to ensure that this is done, the entity is required to apply as a matter of law. It clearly is incumbent on the NCC to express its views sufficiently clearly so that there can be no ambiguity as to whether there is a likelihood of an adverse effect and whether it will involve a protected area or the critical habitat of a protected species. In my view, once that has*

happened then the entity has no choice but to apply under s.41(4), whether it agrees with the NCC or not."

39. Once the NCC has been consulted, the NCC, or the Director in its stead, may impose conditions or refuse permission in accordance with section 41(5) of the NCA.

40. It is apparent from the Director's Memorandum that she concluded that the development would likely affect the nesting habitat of the SIRIs and the adjacent marine conservation area and accordingly gave directions and recommendations. But should the DCB have re-referred the matter to the NCC for consultation as provided for in section 41(4) after receiving directions and recommendations? We conclude that no such referral was necessary as section 41(3) & (4) had been complied with. The reason we come to this conclusion is because the two consultation stages were compounded in the Director's Memorandum: She both gave opinions as to the likely effect of the development (consultation under section 41(3)) and made directions under section 41(5) which occurs only after a section 41(4) consultation. Consequently, with the directions and recommendations having already been made by the Director, on behalf of the NCC, there was no further purpose of consultation with the NCC, the process having been completed. Consequently, there was no requirement to further consult. We must, therefore, reject the Appellants' submission that the DCB failed to consult the NCC as required by Law.

41. Finally we turn to the direction and recommendations, which together are the final two "errors of law" as alleged by the Appellants. The Director gave one direction, namely that –

    (f) All construction materials shall be stockpiled a minimum of 50 ft from the Apparent High Water Wash Line.

42. Walters J in **National Conservation Council v Central Planning Authority** confirmed that such directives must be adopted by the CPA when they are issued by the Director acting under delegated powers. In this instance the DCB did incorporate that directive into the final conditions of approval and therefore were compliant with the Act.

43. The Director also made 5 recommendations, namely,

(a) A walkover survey shall be conducted, as agreed by the DoE, prior to commencing works on-site to ensure that no iguanas or nests are present.

(b) There shall be no mechanical clearing, heavy equipment, construction work or stockpiling of construction materials outside of the parcel boundaries.

(c) There shall be no construction work which involves excavation, filling or laying of foundations from 1 May – 1st September to avoid crushing or causing harm to nesting iguanas and their nests.

(d) Any sand excavated during construction works shall remain on-site.

(e) Any cats, dogs or pets on the property shall be contained or leased at all times to avoid causing inadvertent harm to iguanas.

44. Recommendations (a), (c) and (d) are expressly incorporated into the final conditions imposed by the DCB. However, recommendations (b) and (e) appear to have been omitted. The Appellants say that the DCB fell into error in not adopting those two recommendations and that even if they had a discretion whether to adopt or reject any Director/NCC recommendations they failed to give adequate reasons for rejecting them. The Respondents counter that it was entirely within the DCB's discretion to not adopt recommendations (b) and (e).

45. The DCB's gave the following account of the Director's recommendations –

"Recommendations of the Department of Environment have been considered and conditions of approval imposed as deemed appropriate by the Board."

46. No reasons were given for rejecting either of the two omitted recommendations. The Respondents assert that recommendation (b) is incorporated into condition 7 while recommendation (e) was unnecessary as there was no evidence of stray animals being on the property. We place little weight on these two explanations as Miss Middleton was in essence attempting to give evidence of the DCBs reasoning or speculating as to their reasoning. The critical point is that the DCB did not expressly address the two recommendations in question.

47. Henderson J held in **National Roads Authority v A. Bodden, Thompson and Wright (as representatives of the estate of H. Bodden) [2014(2) CILR 47]** that a government entity when giving its decision must give sufficient detail that any person reading the decision would have

no substantial doubt as to whether it had made an error in law; while it is not necessary to give reasons for every material consideration, the decision must refer to the main issues in dispute.

48. We accept Miss Middleton's submissions that the DCB were not bound to follow the Director's recommendations. However, we agree with the Appellants that the DCB's reasons are wholly inadequate given the particular subject matter. The DCB is not an expert in matters of the environment and in particular conservation of protected habitat or species. The DoE on the other hand has considerable expert knowledge in this field. We expect the DCB to have carefully considered the recommendations of the Director and give clear analysis and reasons for not following the advice of the experts. They did not do so and have left uncertainty as to whether they addressed their mind properly to the important question of the preservation of the SIRIs' habitat and so whether they acted reasonably when they decided to grant approval for the development. These omissions in the reasons mean that the DCB's decision is erroneous in law. This ground of appeal therefore succeeds.

Unreasonable Decision

49. The Appellants assert that the DCB's decision was unreasonable because –

    (i) The DCB failed to obtain an EIA before making the decision therefore relevant information was omitted from the decision-making process; and

    (ii) The DCB failed to take into consideration that the landside resort was only one part of a larger development which included overwater bungalows and thereby failed to take a material matter into consideration.

50. As we have stated above, it is the duty of the NCC (or the Director in exercise of delegated powers) to determine whether an EIA is required. The DCB cannot be faulted for proceeding without one where the NCC/Director did not order one.

51. The Appellants argue that while the application only concerned the overland resort and amenities, because of previous plans included overwater bungalows, the DCB should have included the overwater elements in their deliberations. We disagree with this proposal because it would mean the DCB would be going beyond the application before them. They have no knowledge of whether Peppercorn would continue to pursue the overwater element with Cabinet. Having not heard the argument in full we cannot determine at this stage (and it would be inappropriate to do so) whether Peppercorn would be required to apply to the DCB for permission to build the bungalows after the coastal works licence had been granted. That will have to be determined on another occasion. Neither is it appropriate to speculate, nor is it relevant, whether Peppercorn split the application in the hope of improving their chances of getting approval for both parts of the development.

52. We conclude that had the DCB taken the overwater bungalows into consideration they would have been considering irrelevant material which would have made their decision unreasonable. By looking at the application before them in isolation they were taking only relevant matters into consideration. Consequently, the Appellant's final objection fails also.

Conclusion

53. For the reasons we have set out above, only one of the Appellant's ground of appeal succeeds, namely that the DCB's reasons lack in details to such an extent that we cannot say with certainty that the DCB properly considered material issues. Consequently, **the DCB decision to grant the planning approval is quashed and the matter is referred back to the DCB for reconsideration.** We impress upon the DCB that their reasons for decision must demonstrate their reasons with sufficient clarity that the reader knows what their thought process was and the reasons for coming to their final conclusions.

Procedural Matters

54. Section 49(3) of the Development and Planning law (2021 Revision) provides that -

"The Chairperson of the Appeals Tribunal shall not have an original vote but in the event of the other members of the Tribunal being equally divided the Chairperson of the Appeals Tribunal shall have a casting vote."

55. In this matter the other tribunal members were in agreement and, therefore, the Chairperson did not cast a vote.

_____

Chairperson of the Planning Appeals Tribunal
for Cayman Brac and Little Cayman