[2022] JMSC Civ. 21

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU 2019 CV 03433

BETWEEN	**HOPE WINT**	**1st CLAIMANT**
A N D	**SAMANTHA GAYLE**	**2ND CLAIMANT**
A N D	**RICHARD COE**	**3RD CLAIMANT**
A N D	**JANET WRIGHT**	**4TH CLAIMANT**
AND	**KINGSTON & ST. ANDREW MUNICIPAL CORPORATION**	**1ST DEFENDANT**
A N D	**THE NATURAL RESOURCES CONSERVATION AUTHORITY**	**2ND DEFENDANT**
A N D	**RAYMOND McMASTER**	**INTERESTED PARTY**
A N D	**WENDY McMASTER**	**INTERESTED PARTY**

IN OPEN COURT

Mr. Gavin Goffe instructed by Myers Fletcher & Gordon for the Claimants

Mrs. Rose Bennett Cooper & Ms Sidia Smith instructed by Bennett Cooper Smith for the First Defendant

Ms Althea Jarrett & Ms Kristina Whyte instructed by the Director of State Proceedings for the Second Defendant

Heard: May 17, 18 & 19, 2021 and February 18, 2022

Judicial Review – Whether the relevant authorities acted ultra vires - Statutory Interpretation – Legitimate Expectation – Town and Country Planning Act – Natural Resources Conservation Authority Act – 1966 Town and Country Planning (Kingston) Development Order – Town and Country Planning

(Kingston and Saint Andrew and Pedro Cays) Provisional Development Order, 2017

SONIA BERTRAM LINTON, J

[1] Let me at the onset acknowledge the invaluable scholarship and support of my Judicial Clerk, Attorney-at-Law Miss Sherika Paul for her assistance in the conclusion of this judgment.

BACKGROUND

[2] This matter concerns an Application brought by the Claimants/Applicants, to quash permits granted by the Kingston & St. Andrew Municipal Corporation (hereinafter "KSAMC") and the Natural Resources Conservation Authority (hereinafter "NRCA") to Plexus Limited in respect of a proposed development located at 29 Dillsbury Avenue, Kingston 6 in the parish of St. Andrew.

[3] However, to appreciate the elements of this case it is important to understand how it evolved. The KSAMC at their Building and Town Planning Committee meeting held on November 7, 2018 approved building and planning permission to registered proprietors Raymond and Wendy McMaster for the construction of five townhouses and a four storey apartment block consisting of six apartment units. It was to include; basement parking, a pool, pool deck, and guard-house and garbage receptacle totalling 3071.24 square meters on a lot size of 2768.82 square meters at 29 Dillsbury Avenue, Kingston 6.

[4] On or about September 12, 2018 the NRCA also granted Permit No. 2018-02017-EP00246 to Raymond and Wendy McMaster to construct 10-25 houses at 29 Dillsbury Avenue, Kingston 6. However, the Claimants say they did not receive the "Notice of Intention to Submit Plans". This would have given them the option to object to the approval of the plan within thirty (30)

days from the date of the "Notice of Intention". Instead, the Claimants say they received the "Notice of Intention to Submit Plans" after the plan was already approved.

[5] As a result, the Claimants/Applicants filed an Application for Leave to Apply for Judicial Review on August 26, 2019. In this application they sought permission to apply for an order of certiorari to quash the KSAMC's building and planning permission (No. 2017-02001PB00966) that was granted to Plexus Limited to erect a four-storey multi-family development at 29 Dillsbury Avenue, Kingston 6 in the parish of St. Andrew.

[6] They also sought an order to quash the NRCA's grant of a Permit to Undertake Enterprise, Construction or Development in a Prescribed Area (No. 2018-02017-EP00246) to Raymond & Wendy McMaster in connection with a proposed four-storey multi-family development at 29 Dillsbury Avenue, Kingston 6, in the parish of St. Andrew. The Claimants also asked that the grant of permission, operate as a stay of the permits that were issued to the KSAMC and NRCA.

[7] This Application was supported by an Affidavit of Hope Wint, (the First Claimant) on behalf of herself and the other Claimants where she gave evidence justifying the reasons for seeking Judicial Review of the approval granted to the developers.

[8] On October 22, 2019 Nembhard, J granted their Application for Leave to Apply for Judicial Review. As a result, on November 4, 2019 the Claimants filed a Fixed Date Claim Form claiming:

1. *"An order of certiorari to quash the 1st Defendant's building and planning permission (No. 2017-02001PB00966) granted to Plexus Limited to*

construct a four-storey multi-family development at 29 Dillsbury Avenue, Kingston 6 in the parish of St. Andrew;

2. *An order of certiorari to quash the 2nd Defendant's grant of a Permit to Undertake Enterprise, Construction or Development in a Prescribed Area (No. 2018-02017-EP00246) to Raymond and Wendy McMaster in connection with a proposed four-storey multi-family development at 29 Dillsbury Avenue, Kingston 6, in the parish of St. Andrew;*
3. *An injunction to compel the Defendants to take all necessary steps to halt all development at 29 Dillsbury Avenue, Kingston 6, in the parish of St. Andrew that is in breach of any laws, regulations or orders over which they have jurisdiction;*
4. *Costs; and*
5. *Further or other relief as the court deems just.*

The grounds on which the Claimants seek these orders are as follows:

1. *The building and planning permission granted by the 1st Defendant is illegal and in breach of s. 7 of the Kingston and St. Andrew Building (Notices and Objections) Regulations, which required the 1st Defendant to take into consideration all objections before coming to a determination on any application for development.*
2. *The building and planning permission granted by the 1st Defendant and the permit issued by the 2nd Defendant are illegal and irrational as the proposed development is not in conformity with the Town and Country Planning (Kingston) Development Order, 1966 and the Town and Country Planning (Kingston and Saint Andrew and the Pedro Cays) Provisional Development Order, 2017.*
3. *The proposed development will contravene restrictive covenants on the Title of which the Claimants are beneficiaries.*

4. *The 1st Defendant acted in bad faith and in breach of the principles of fairness, natural justice and the Claimants' legitimate expectations when it agreed to meet with the Claimants to discuss their concerns and then reneged on that promise.*
5. *The Claimants' are directly affected by the Defendants' decisions.*
6. *Other than judicial review, there is no other suitable remedy available to the Claimants."*

[9] The Fixed Date Claim Form was supported by the Affidavit of Hope Wint where her evidence is that the Claimants say they did not receive the "Notice of Intention to Submit Plans" which was dated March 26, 2019 until sometime after that date. The notice outlined that all persons who proposed to object to the approval of the plan do so in writing within thirty (30) days from the date of the notice.

[10] As a result, the Claimants say they delivered notices of objection on April 25, 2019 outlining the grounds for their objection. Firstly, the proposed development includes an apartment with 5 levels in an area that only permitted 4 levels. Another ground was that the design of the apartment would impede the Claimants' access to light and constrain their right to privacy. Moreover, the Claimants are of the view that sections of the development, in particular, the pool deck and the basement are closer than the minimum setback of 1.5 metres from the boundary. Based on their interpretation of the regulations the Claimants are of the view that the development is too dense.

[11] In response to their objection they received communication from the Chief Executive Officer of KSAMC that they would respond in greater detail but the Claimants say as at November 1, 2019 there was no such response.

[12] In addition, Ms Wint said she received an incomplete copy of the letter of approval which stated that KSAMC approved the application for building and planning of the development on November 7, 2018 in accordance with plans that were submitted on November 20, 2017 and later amended on May 5, 2018 and September 20, 2018. Therefore, the Claimants are of the view that the Defendants did not share the "Notice to Object" to the development with them until months after the approval was granted.

[13] The Claimants are also saying that despite their notice of objection to the development which they said was done in time, the First Defendant refused to do anything in relation to the matter. As a result, the Claimants/Applicants filed an Application for Leave to Apply for Judicial Review on August 26, 2019 which was granted on October 22, 2019.

[14] The matter before me is the first hearing of the Fixed Date Claim Form filed on November 4, 2019.

SUBMISSIONS

The Claimants' Submissions

[15] In support of the claim against the First and Second Defendants, Counsel for the Claimant is relying on the evidence contained in the affidavits of Hope Wint on behalf of herself and the other Claimants. Mr. Goffe submits that there are two main issues; the first of which is whether the KSAMC's grant of the building/planning permission without considering the objections of the Claimants was illegal.

[16] To support the issue of illegality Mr. Goffe relied on ***Section 7 of the Kingston and St Andrew Building (Notices and Objections) Regulations*** which states that before coming to a determination on plans that have been

submitted, the building authority must consider all objections and the grounds on which they were made to grant or refuse the approval of the plans that were submitted.

[17] Counsel said that the ***Kingston and St. Andrew Building Act and the Kingston & St. Andrew Building (Notices and Objections) Regulations*** applies to the case as the evidence suggests that the developer intends to have a strata office on the premises which would constitute a business within the meaning of Regulations 3 (b).

[18] Counsel further stated that by virtue of ***section 11 (1A) of the Town and Country Planning Act***, the KSAMC acted ultra vires as it lacked the authority to use its discretion to vary the minimum standards specified in the 1966 Development Order or the 2017 Provisional Development Order.

[19] The second issue is that of irrationality due to the Defendants' failure to take into account material considerations before granting the permit. Counsel relied on authorities such as ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** *[1948] 1 KB 223.* He also referred to ***The Northern Jamaica Conservation Association v The Natural Resources Conservation Authority*** *(unreported) 2005 HCV 3022 delivered April 16, 2006,* to emphasize that the KSAMC and the NRCA did not consider or apply the 2017 Provisional Development Order which he submits is a material consideration under the law.

The First Defendant's Submissions

[20] Counsel for the First Defendant stated that the KSAMC's grant of permission for the development at 29 Dillsbury Avenue, Kingston 6 in the parish of St. Andrew was rationally and legally reached. In relation to the point of illegality

Counsel highlighted the case of ***Council of Civil Service Unions and Others Appellants and Minister For The Civil Service*** *[1985] A.C. 374* where Lord Diplock at page 410 emphasized that illegality is a ground for judicial review.

[21] In ***R v Lord President of the Privy Council, ex p. Page*** *[1993] AC 682* Lord Browne- Wilkinson at page 701 stated that illegality refers to any error of law that is made by the decision maker in relation to their power or their application of the law that can lead to that decision being quashed. Lord Browne-Wilkinson also emphasized that the courts have developed principles of judicial review. The fundamental principle being that the courts intervene to ensure that the decision-making body lawfully exercised their power. Where the decision-making body exercises power outside their jurisdiction in a manner which is procedurally irregular or unreasonable, it is acting ultra vires and thus the decision is unlawful.

[22] In relation to the issue of whether the building permission was granted in breach of **section 7 of the Kingston and St. Andrew Building (Notices and Objections) Regulations**, Counsel referred the Court to sections 3-7 of the Regulations and the cases of ***Ashbridge Investments Limited v Minister of Housing and Local Government*** *[1965] 1 WLR 1320* and ***Brutus v Cozens*** *[1973] AC 854.* These authorities were used to emphasize that the Court should not intervene on the grounds that a body has reached an erroneous finding of fact unless it is found that the statutory authority has gone outside the scope of the Act. On that basis it was submitted that there is no evidence that the KSAMC went outside its powers or failed to comply with the terms of section 7 of the Regulations when it granted the building permission. Therefore, the decision to grant the building permission was legal and not in breach of section 7 of the Regulations.

[23] On the issue of irrationality ***Associated Provincial Picture Houses v Wednesbury Corporation*** *[1948] 1 KB 223.,* was used to emphasize that decisions may be quashed for irrationality where it was so unreasonable that no reasonable person or body following the law could have made it. In this case Lord Green stated that “unreasonableness” is often used as a description of the things that must not be done. In addition, it takes into consideration extraneous matters. If it is so unreasonable it may be described as being done in bad faith.

[24] Counsel further submitted that building permissions were not granted pursuant to the ***Development Order of the Provisional Development Order***. Instead, it is determined in accordance with the provisions of the ***Kingston and St. Andrew Building Act.*** As a result, there is no basis in law for the supposition that the building permission is in breach of the ***Development Order or the Provisional Development Order***. Pursuant to ***sections 5-8*** of the ***Town and Country Planning Act***, the Provisional Development Order is subject to objections and changes before it is brought into force. ***Section 11*** of the ***Town and Country Planning Act*** provides that the local authority is not required to follow either the *Development Order* or the *Provisional Development Order* without variance, when considering whether to grant the planning permission. It is the planning authority in Jamaica that has the discretion to consider other material considerations. On that basis she submitted that the KSAMC gave due consideration to the Development Order and the Provisional Development Order in exercising its discretion to grant planning permissions in this case.

[25] In response to the Claimant’s allegation that KSAMC failed to properly calculate the habitable rooms for the proposed development counsel referred

to Sectoral Policy SP H30 and stated that it is employed where the proposed development consists of studio units. Therefore, it is not applicable because the proposed development does not include studio units. As a result, counsel submitted that the Sectoral Policy SP H30 does not apply and the KSAMC acted lawfully in its calculation of habitable rooms and has not breached Policy BH 2 of the Barbican Local Area Plan as alleged by the Claimant.

[26] Mrs. Rose Bennett Cooper also addressed the issue of the basement, pool and pool deck being in breach of the Provisional Development Order on the basis that they are above ground and grade. She submits that the basement is below grade structure, the pool is located on the floor of the roof of the basement. Counsel submitted that the KSAMC's evidence be preferred to that of the Claimant because the permits granted by the KSAMC puts the building within the setbacks provided by the Provisional Development Order. Therefore, the decision of the KSAMC to grant permission with the relevant setbacks is neither illegal nor irrational. The basement is not a storey and therefore, the height of the proposed building is in keeping with Policy BH 2 (b).

[27] In response to the allegation that the development will contravene restrictive covenants on the title of the Claimants the First Defendant referred to ***section 3 (2) of the Restrictive Covenant (Modification and Discharge Act).*** This was used to state that it is the court that is empowered to modify and/or discharge restrictive covenants as they deem fit. ***Re: Martin's Application*** *[1988] EWCA Civ. 1,* emphasized that in our jurisdiction it is the Judge in Chambers who is to consider the applications under referred to section 3 (2) of the Restrictive Covenant (Modification and Discharge Act). As a result, it was submitted that the grant of the building and planning permission should

not be quashed because the proposed development contravened restrictive covenants. The grant by KSAMC did not dispense with the applicants' duty to apply for the discharge or modification of restrictive covenants.

[28] On the ground of fairness, natural justice and legitimate expectation counsel referred to ***R v Falmouth and Truro Port Health Authority, ex. P. South West Water Ltd*** *[2001] QB 445* to state that legitimate expectation only arises where there is a duty to consult before making a decision. In order for there to be a legitimate expectation a decision must have been made by the public authority to consult before making the decision. The principle established in ***R v North and East Devon Health Authority, ex parte Coughlan (Secretary of State for Health and another intervening)*** *[2003] 3 ALL ER 850* was used to support the submission that the agreement on the part of KSAMC to meet with the Claimants came after the grant of the planning permissions. Therefore, there was no clear assurance given by KSAMC, thus, they say that their failure to meet with the Claimants should not be a ground to quash the permission.

[29] ***Cannock Chase District Council v Kelly*** *[1978] 1 W.L.R* and ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** *[1948] 1 K. B. 223* were used to emphasize that to prove that the KSAMC acted in bad faith the Claimants must prove that they acted with dishonesty or malice. Therefore, the Claimants' failure to submit evidence of dishonesty or malice on the part of KSAMC should result in the court allowing the building and planning permission granted in November 2018 to stand.

The Second Defendant's Submissions

[30] In response to the Claimants' allegations that the Second Defendant breached the ***Kingston and St. Andrew Building Act and the Kingston &***

St. Andrew Building (Notices and Objections) Regulations their case is that the application for the permit was made pursuant to ***section 9 (3) of the Natural Resources Conservation Authority Act.*** On that basis they submitted that what needs to be considered is the actual application submitted and not the actual construction. To support this argument, they referred to ***South Bucks District Council v Porter; Chichester District Council v Searle & Ors; Wrexham.***

[31] Counsel stated that there were three issues to consider in the matter. The first issue is whether the ***1966 Development Order*** was breached. The second issue is whether the ***2017 Development Order*** is applicable. In relation to these two issues counsel referred to ***Section 5 of the Town and Country Planning Act***. This supported their view that the ***1966 Development Order*** was confirmed in ***section 7 of the Town and Country Planning Act*** while the ***2017 Development Order*** was not. However, ***R v City of London Corporation ex parte Allan*** *[1980] Lexis citation 279* is clear that a draft development document is a material consideration that the planning committee must take into account although it is not binding. Counsel submitted that there is no provision in the 1966 Development Order that addresses the density or the other areas of the construction that the Claimants objected.

[32] The third issue is, if the ***2017 Development Order*** is applicable, did the Second Defendant act unlawfully or irrationally in its application of its provisions. The Second Defendant submits that while the development orders are not statues, they are legal documents created pursuant to the exercise of statutory powers under the Town and Country Planning Act. As a result, the rules of statutory interpretation ought to apply unless they are overridden by

the actual words of the development order. Therefore, except for the interpretation of Policy B H3 that is within the expertise of the planning authorities, the court should be reluctant to disturb the Second Defendant's decision unless it is irrational. They are of the view that their approach to the application of the ***2017 Development Order*** is not irrational.

[33] The areas of challenge to NRCA's decision in relation to the proposed development are density, building height and setbacks. In relation to the challenge about the density of the development counsel stated that ***Policy BH1*** allowed for multifamily developments on lands which are ½ an acre and over. Therefore, the 33 rooms constructed on 0.684 acres of land could have been undertaken. It was also stated that ***Policy BH2*** also allows for 34 rooms spread across 4 storeys as the maximum number allowed on the land of the proposed development.

[34] In relation to the height of the development they submit that it is not irrational based on the evidence of Gregory Bennett who said that the basement is below ground level and therefore should not be treated as a storey. The portion of the basement below grade does not exceed the portion above grade. Therefore, there was no irrationality on the part of NRCA in the treatment of the height of the building and number of storeys.

[35] The policy applied to the setback is Policy BH4 to support their argument that all the setbacks were adequate and that there was no irrationality in fact they submitted that the setbacks were greater than what was contemplated in Policy BH4. Moreover, they said that the correct interpretation of Policy BH4 would not result in the setbacks being applied to the pool, the pool deck and the basement. The proper interpretation of the policy considers that it stipulates that the measurement for the setback is from "sides per floor" and

the manual outlines that areas below ground are not regarded as part of a storey for which the setbacks would apply.

[36] The Claimants have also alleged that the development has compromised their view, deprived them of privacy, the boundary wall has allowed people access to their premises and has reduced light and air flow into their homes. They have also alleged that running water from the development unto the dividing wall has damaged it. The NRCA's argument is that the setbacks applied pursuant to the 2017 Development Order were implemented to address most of these issues thus, they did not act irrationally. Therefore, the substance of the Claimants' complaint is not enough for the permit to be quashed. The power to revoke permits for non-compliance should be in the purview of the NRCA.

[37] The NRCA's case is that the 1966 Development Order does not address the areas of the development that the Claimants are challenging. Also, they submit that they properly interpreted and applied the relevant provisions of the 2017 Provisional Order and were not unlawful or irrational in granting the permit. As a result, the orders sought against them by the Claimants ought to be dismissed with costs.

ISSUES

[38] 1. Whether the First Defendant acted lawfully and within the Kingston and St. Andrew building Act and the Kingston and St. Andrew Building (Notices and Objections) Regulations in respect of the permits issued for 29 Dillsbury Ave Kingston 6.

(i) Were they obliged to utilize their discretion of revocation and/or enforcement when they became aware of Plexus Limited's

disregard of the KSMC's Building (Notices and Objections) Regulations?

(ii) Whether KSAMC breached section 7 of the Kingston & St. Andrew Building (Notices and Objections) Regulations by granting building and/or planning permission without considering the objections from the applicants.

(iii) Whether the building and planning permissions granted by KSAMC and the permit issued by NRCA are illegal and irrational on the basis that the development located at 29 Dillsbury Avenue, Kingston 6 is not in conformity with the Town and Country Planning (Kingston) Development Order, 1966 and the Town and Country Planning (Kingston and St. Andrew and the Pedro Cays) Provisional Development Order, 2017.

2. Has the NRCA, the Second Defendant failed to properly interpret and apply Policy B H3 of the Town and Country Planning (Kingston and St. Andrew) which stipulates the minimum setbacks from property boundaries for apartment/ townhouse development, in respect of the basement, the pool and the pool deck.

3. Has the 2nd Defendant acted incorrectly in their determination that the basement should not be treated as a floor when determining the permitted height of the building in keeping with the regulations?

4. Has the proposed development breached Policy B H2 Town and country Planning (Kingston and St. Andrew and the Pedro Cays) Provisional Development Order, 2017 and the KSAC confirmed development order when it granted environmental permits and permission to build in excess of 32 habitable rooms to be constructed on 0.68 acres?

THE LAW AND ANALYSIS

The Ambit of Judicial Review

[39] ***Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935*** outlines that in the exercise of Judicial Review the role of the Court is to make a determination as to whether the decision made by an authority can be challenged. Judicial Review can only be used in limited circumstances where, for example, the decision maker goes beyond their legal powers or has not considered matters that ought to have been lawfully considered or what was considered was not relevant, or the decision was so unreasonable that no reasonable person in the same position would have made it.

[40] The cases of ***Chief Constable of North Wales Police v Evans*** *[1982] All ER and* ***R Corner House Research v Director of the Serious Fraud Office*** *[2009] 1 AC 756 also* clearly outline the scope of the law on judicial review. These cases make it clear that judicial review is not concerned with the merits of the decision but is concerned with reviewing the process. Therefore, it does not substitute the opinion of the authority but determines whether the decision arrived at by the authority was lawfully made. Therefore, the role of the Court on an application for Judicial Review of a planning decision is to simply interpret the policy where its meaning is contested.

Issue 1: Whether the First Defendant acted lawfully and within the Kingston and St. Andrew building Act and the Kingston and St. Andrew Building (Notices and Objections) Regulations in respect of the permits issued for 29 Dillsbury Ave Kingston 6.

[41] For the Court to make a conclusion on this overriding issue, the sub issues must be considered and resolved. The first sub issue is:

(i) Were they obliged to utilize their discretion of revocation and/or enforcement when they became aware of Plexus Limited's disregard of the KSMC's Building (Notices and Objections) regulations?

[42] **Section 22 of the Town and Country Planning Act** provides guidelines on how to revoke and modify planning permission. It states that:

> *"22.--(1) Subject to the provisions of this section, if it appears to the local planning authority that it is expedient, having regard to the provisions of the development order and to my other material considerations that any permission to develop land granted 011 an application made in that behalf under Part 111 should be revoked or modified, they may by order revoke or modify the permission to such extent as appears to them to be expedient as aforesaid:*
>
> *…*
>
> *(3) The power conferred by this section to revoke or modify permission to develop land may be exercised-*
>
> *(a) where the permission relates to the carrying out of building or other operations, at any time before those operations have been completed;*
>
> *(b) where the permission relates to a change of the use of any land, at any time before the change has taken place:*
> *Provided that the revocation or modification of permission for the carrying out of building or other operations shall not affect so much of those operations as has been previously carried out."*

[43] The KSAMC, having considered the relevant development order has the discretion to modify or revoke permission granted for the development of land where it is necessary to do so based on the circumstances. The KSAMC has the authority to revoke or modify the permission where the permission was related to building operations before its completion. Therefore, if the KSAMC

had considered the Claimants' objections when they were served, they would have had the authority to revoke or enforce the permission granted especially after realizing the developers were not acting in conformity with the permission that was granted.

(ii) Whether KSAMC breached section 7 of the Kingston & St. Andrew Building (Notices and Objections) Regulations by granting building and/or planning permission without considering the objections from the applicants.

[44] ***Section 7 of the Kingston & St. Andrew Building (Notices and Objections) Regulations*** refer to the treatment of objections. It provides that:

> *"7. The Building Authority shall before coming to a determination on the plans submitted take into consideration all objections which may be made and the grounds thereof and may either grant or refuse approval of the plans submitted or may appoint a time and place to hear the parties and give notice of such appointment to the owner of the proposed site and to every objector and at such hearing the owner of the proposed site and the persons who have objected may appear or be represented by counsel or solicitor but at such hearing no objection to the proposed-building other than those contained in the notices delivered may be put forward or argued."*

[45] In the instant case the Claimants prepared their Objections in relation to the proposed development which they delivered to the office of the KSAMC. Therefore, before arriving at a decision to grant the permit for the development the KSAMC should have considered the objections made by the Claimants or should have appointed a time and place to hear the objections having given notice to the developers Plexus Limited. The Court is of the view that the section 7 of the Regulations creates a legitimate expectation on the part of the Claimants that the KSAMC would have considered their objections or convenes a hearing for them to express their concerns.

[46] In ***Young, Michael and Young, Jacqueline et al v Kingston and St. Andrew Municipal Corporation and National Environmental and Planning Agency*** *[2020] JMSC Civ. 251* paragraphs 187-188 refer to Lord Diplock's point on legitimate expectation at pages 409-409 of ***Council of Civil Service Unions v Minister for Civil Service*** (supra). In this case Lord Diplock said:

> *"…a "legitimate expectation," rather than a "reasonable expectation," … indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a "reasonable" man, would not necessarily have such consequences..."*

[47] The established practice is for the Court to conduct an independent assessment to determine whether the Claimants had a legitimate expectation. The Court has considered the facts on which the Claimants are relying that there was a breach of ***section 7 of the Kingston and St Andrew Building Act and the Kingston & St. Andrew Building (Notices and Objections) Regulations*** and has found that there was a breach. While the KSAMC did not make a promise to the Claimants that there would be a hearing the Act and Regulations points to a legal right vested in the Claimants to be heard on their points of objection before any permit was granted.

[48] In ***Derrick Wilson v The Board of Management of Maldon High School and Other*** *[2013] JMCA Civ. 21* Harris JA said that:

> *"29. Natural justice demands that both sides should be heard before a decision is made. Where a decision had been taken which affects the rights of a party, prior to the decision, in the interests of good administration of justice, the rules of natural justice prevail."*

[49] Upon the authority of ***Derrick Wilson*** (supra) the KSAMC's failure to hear the Claimants' side before granting the permit constituted a breach of natural justice. It is important to state that based on Regulations, the justice of the situation required either that the Claimants' objections be considered by the KSAMC or that a hearing be held. Therefore, if no hearing was held but the KSAMC had considered the objections of the Claimant it would have been enough. However, the Court finds that the failure on the part of the KSAMC to consider the Claimants' objections or to convene a hearing was unfair in that it breached their legitimate expectation, principles of natural justice and ultimately was a breach of ***section 7 of the K*****ingston & St. Andrew Building (Notices and Objections) Regulations.**

(iii) Whether the building and planning permissions granted by KSAMC and the permit issued by NRCA are illegal and irrational on the basis that the development located at 29 Dillsbury Avenue, Kingston 6 is not in conformity with The Town and Country Planning (Kingston) Development Order, 1966 and The Town and Country Planning (Kingston and St. Andrew and the Pedro Cays) Provisional Development Order, 2017.

[50] ***Section 11 of the Town and Country Planning Act*** provides:

> *"11. -(1) Subject to the provisions of this section and section 12, where application is made to a local planning authority for permission to develop land, that authority may grant permission either unconditionally or subject to such conditions as they think fit, or may refuse permission; and in dealing with any such application the local planning authority shall have regard to the provisions of the development order so far as material thereto, and to any other material considerations…"*

[51] This gives the KSAMC the authority to grant permission whether unconditionally or subject to considerations. It also gives the KSAMC the authority to refuse permission. However, in dealing with any application they receive they shall give regard to the provisions of the Development Orders so far as is material. Therefore, the First Defendant was correct in their interpretation of the TPCA when they said that they are the authority in Jamaica with the discretion to consider other material considerations. However, it is arguable whether the KSAMC gave due consideration to the Development Orders in exercising its discretion to grant planning permissions as they said they did. Therefore, the Court will examine the relevant sections of ***Town and Country Planning (Kingston) Development Order, 1966 and The Town and Country Planning (Kingston and St. Andrew and the Pedro Cays) Provisional Development Order, 2017*** respectively.

[52] ***The Town and Country Planning (Kingston) Development Order, 1966*** provides the local planning authority which is the KSAMC with the authority and the guidelines to follow when granting planning permits. Section 6 (3) outlines that the applications for permission must be in writing with the plans and drawing attached. The applicant must also produce additional copies of the application, plans and drawings as were required in relation to that application. Section 6 (5) states that once the planning authority receives an application, they should issue the applicant with an acknowledgement. Section 6 (6) states that the planning authority can in writing request evidence in respect of the application to verify any particulars of the information they received with the application.

[53] One of the disputed issues in the case at bar is that of calculating the average grade. Mr Shawn Martin in his evidence said that the developers did not include a drawing showing the average grade. Based on section 6 (6) the KSAMC could have requested the information in relation to the average grade. Mr Martin said that the KSAMC conducted their own assessment after which permission was granted. However, when asked about the document containing this assessment, he said that there was no document in existence to reflect the assessment. He also said that there were differences in the plans submitted and what was happening at the development. Based on the evidence the Court finds the actions of the KSAMC in arriving at their decision to grant the planning permission to Plexus Limited failed to give due consideration to the Act and thus they are in breach of ***The Town and Country Planning (Kingston) Development Order, 1966.***

[54] The Court will examine the relevant sections of ***The Town and Country Planning (Kingston and St. Andrew and the Pedro Cays) Provisional Development Order, 2017. Sections 8-9 of The Act*** are reproduced below:

> *"8.— (1) Upon receiving an application for planning permission, the local planning authority shall send to the applicant an acknowledgement of receipt of the application in writing in the form set out as Form A in the Fourth Schedule. (2) The local planning authority may, upon considering the application for planning permission— (a) grant planning permission; (b) grant planning permission subject to conditions; (c) refuse to grant planning permission.*
>
> *9.— (1) Subject to sub-paragraph (2) of this paragraph no development of land of within the area to which this Order applies, shall take place, except in accordance with this Order and permission granted in relation thereto. (2) The local planning authority may subject to any conditions as may be specified by directions given by the Minister under this Order grant permission for development which does not*

> *appear to be provided for in this Order and is not in conflict therewith."*

[55] Based on sections 8-9 the KSAMC has the discretion to grant unconditional or conditional permission, or they can simply refuse to grant permission. Also, no development is to take place unless it is consistent with the Order and permission given. The evidence before the Court is that the plans submitted in evidence were different from the plans used by the KSAMC to grant the planning permission. In his evidence Mr. Chevannes stated that the KSAMC did not have a document which determined that the average grade was 10ft. He also said he did not check the depth of the apartment to see if it was in line with the approval and that there was no document reflecting this inspection which he says was done by Mr Clarke and Mr Lawrence. While the planning permit was granted unconditionally the evidence does not indicate that the KSAMC did enough to ensure that the development was consistent with the Order and permission that was given. ***The Town and Country Planning (Kingston and St. Andrew and the Pedro Cays) Provisional Development Order, 2017*** makes it clear that the development must be consistent with the permission given. Therefore, their inability to confirm and ensure that the proposed development was in conformity with the Development Order, 2017 constitutes a breach.

Illegality and Irrationality

[56] ***Council of Civil Service Unions and Others v Minister for the Civil Services*** *[1985] AC 374*, is important in defining illegality in this context. In this case Lord Diplock at page 410 said:

> *By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has*

> *or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*

[57] The evidence before this Court indicates that the KSAMC only partially understood the law as it relates to their authority to grant building permission. The KSAMC was correct in their understanding of their authority to grant the permit. However, the KSAMC failed to do the necessary checks or request the relevant information needed to ensure that the plans conformed with the regulations.

[58] ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223*** is applicable as it provides guidance on how the Court should proceed when trying to determine whether local authorities have acted ultra vires. The case states that in ascertaining whether an authority has acted unreasonably the Court should investigate the actions of said authority to see if they took matters into account that they should not have or if they failed to take into account that they should have. Importantly, the case illustrates that while the court cannot override the authority the court can determine whether that authority contravened the law by acting ultra vires.

[59] ***Upon the authority of Associated Provincial Picture Houses Ltd*** *(supra)* this Court has the jurisdiction to investigate whether the KSAMC in arriving at the decision to grant the planning permit considered all the matters that they should have or failed to take in account things which they should have. The evidence is that they did not follow all the steps related to the grant of the permit such as notifying the Claimants of the proposed development prior to the grant of the permit thus giving them adequate time to object and failing to consider the Claimants' objections about the proposed development. The

Court finds that in the circumstances of this case their actions were in fact ultra vires.

[60] In the case of ***Council of Civil Service Unions v Minister for the Civil Service*** *[1984] 3 ALL ER 935* Roskill LJ at pages 953-954 stated:

> *"…executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to a review on what are called, in lawyers shorthand Wednesbury principles (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 ALL ER 680, [1948] 1KB 223). The third is where it has acted contrary to what are often called principles of natural justice."*

[61] ***Council of Civil Service Unions*** (supra) makes it clear that this Court can review the decision of the KSAMC to grant the planning permission on the basis that they made an error in their interpretation and application of the law and development orders thus resulting in the decision being an unreasonable one.

Unreasonableness

[62] In ***Associated Picture Houses v Wednesbury Corporation*** (Supra) unreasonableness is defined as ***"so absurd that no sensible person could ever dream that it lay within the powers of the authority".*** This definition is today known as Wednesbury unreasonableness and Lord Greene MR at page 229 expounded the meaning of reasonableness as:

> *"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself*

properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation *(1) gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."*

[63] Simply put the actions of KSAMC would be unreasonable if the Court finds that they failed to consider relevant matters and/or considered matters that were irrelevant in the grant of the planning permission to Plexus Limited. Also, if the Court finds that the grant of the planning permission by KSAMC under the circumstances was so absurd that no other authority would have granted it, their actions would be deemed unreasonable.

[64] In considering whether the KSAMC failed to consider relevant matters the Court finds the evidence of the Claimants to be more credible. Their evidence is that the Second Claimant, Ms Gayle served the Notice of Objections on the developers who signed the document. Her evidence is that she attached a photograph of the development to the documents which were submitted to KSAMC on April 25, 2019 who acknowledged service. She then sought copies of the drawing plans from KSAMC and NEPA but were unsuccessful. They eventually received drawings from the developers but were not sure if they were the same plans submitted by the developers to the KSAMC when they sought the planning permission. Their evidence is that they tried to contact the clerk at KSAMC to follow up with the objections but received no response. Based on the evidence the Court is of the view that the KSAMC

breached the development orders, and their actions were illegal and irrational in that they failed to consider the objections of the Claimants which under the circumstances would have been relevant for deciding whether to grant the planning permission.

Issue 2- Has the NRCA, the Second Defendant failed to properly interpret and apply Policy B H4 of the Town and Country Planning (Kingston and St. Andrew) which stipulates the minimum setbacks from property boundaries for apartment/ townhouse development, in respect of the basement, the pool and the pool deck.

[65] ***Policy BH4*** provides:

> *"Minimum setbacks from property boundaries for apartment/townhouse development 125 hr/h (50 hr/a) and over:*
>
> *(i) 1.5 metres from the sides per floor to a maximum of 4.5 metres;*
>
> *(ii) 1.5 metres from the rear per floor to a maximum of 4.5 metres;*
>
> *(iii) the front boundary should be in keeping with the existing building line or as stipulated by the Road Authority."*

[66] Policy BH4 makes it clear that there is a minimum setback from the boundaries of apartments or townhouses which the developers are expected to adhere to.

[67] In addition, ***Section 7 of the Kingston and St Andrew Building Act*** gives guidance on the distances that houses are to be built from the roadway. It provides that:

> *"7. No house or building shall be constructed or begun to be constructed, and no house or building shall be extended or begun to be extended, in such manner that the external wall or front of any such house or building, or if there be a forecourt or other space left*

in front of any such house or building the external fence or boundary of such forecourt or other space, shall be at a distance less than the prescribed distance from the centre of the roadway of any road, street, lane or way, without the consent in writing of the Corporation : Provided always that the Corporation may, in any case where it may think it expedient, consent to the construction, formation or extension, of any house, building, forecourt or space, at a distance less than the prescribed distance from the centre of the roadway of any such road, street, lane or way, and at such distance from the centre of such roadway, and subject to such conditions and terms (if any), as they may think proper to sanction."

[68] The Act makes it clear that all developments are to be built within the prescribed distance from the centre of the roadway or road except where there is written consent from the KSAMC stating otherwise. In the instant case there is no evidence that the KSAMC granted and written permission to vary/reduce the distance of the development from the roadway.

[69] However, the evidence of Mr Gregory Bennett is that if the basement was deemed a storey, then the setback should have been 5ft from the boundary. He also admitted that the basement of the development was not set back 5ft from the boundary. His evidence is that the left side of the development setback was 3.1 ft from the road. The Court finds it strange that the KSAMC who is responsible for outlining the prescribed distance from the roadway knew that in this case it should have been at least 5ft away and did not adhere to its own rules with the development. Furthermore, there was no evidence of any written consent granted by the KSAMC to the developers to vary said distance from the roadway.

[70] The evidence of Mr. Chevannes is very instructive, and the Court was cognisant of the technical distinctions being drawn about how the average grade was calculated and applied. Most interesting was that Kingston and St. Andrew Corporation-Building department development Application

Assessment form (page 171-172 Volume 2 of judge's Bundle) which referenced the inspection by both the Deputy Building surveyor and the City Engineer, bore no indication as to whether the requirements for the floors, stories and levels seen were in keeping with the required standards. This is significant because depending on whether the alleged basement qualified as a storey it would affect the requirement for the setback of the development in relation to the boundaries and the adjoining properties.

[71] Interestingly Mr. Chevannes says that it is the Deputy Building surveyor Lawrence who makes the determination as the correctness of the average grade, and this is what is used to ascertain the setback. According to the assessment form Mr. Lawrence and Shand did not speak to whether the requirements were met in terms of the floors stories and levels, (certainly not in terms of Page 171 Volume two of the document in evidence) Mr. Chevannes could not point us to what policy was used to determine the average and so there appears to have been confusion as to how it was determined and finalised. The one thing that was established was that the establishment of the so-called basement as a storey or not was important to whether they should apply the 'set back' requirement to it. It was agreed that if it was indeed a storey within the definition that should be applied then it was indeed in contravention of the requirement.

[72] What is clear is that there have been problems of water seepage in the past in relation to construction in the vicinity so that the KSMC should have been alive to the potential for problems and should have been clear as to the standard to be applied in the determination of the average grade and the application of the setback for proper approval of any development plans.

[73] The Claimants are correct in stating that proper consideration was not given to this issue that that the Defendants failed in their duty on this issue.

Issue 3- Has the 2nd Defendant acted incorrectly in their determination that the basement should not be treated as a floor in keeping with the regulations?

[74] The Second Defendant contends that the basement should not be treated as a floor because it is below ground level (Affidavit of Gregory Bennett paragraph 19 and GB4) and he cites the development and investment manual while referencing the measurements that had been approved for the development. They say that it was perfectly rational for the NRCA to have granted the relevant permit given that this is done prior to the actual construction taking place, given that the plans as submitted were in keeping with the measurements to determine it as such.

[75] So that the position of the NRCA on this issue is that once the developer has submitted an intention, the permit is granted in keeping with that, and that they have no enforcement and supervisory powers which ensure that the strictures needed for the initial approval are adhered to. Presumably as well the Permit once granted cannot be revoked if it is found that the promised adherence and basis for approval has not been complied with.

[76] In their evidence the Claimants were able to show that the top of the basement is some 10ft above ground and that this was the situation at the time that the claimants were invited to do so by the notice and did lodge their objection. So that where there is a dispute as to whether there is compliance with the basis upon which a permit has been granted as in this case it would

seem quite reasonable that the NRCA could very well determine the basis upon which permits are granted and control the adherence to these permits rather than taking the position that the permit is granted prior to construction and so their job is done.

[77] In fact, it is quite surprising that the witness Mr. Shawn Martin could not say if the authority had at any time satisfied itself that what was in the approval was what was on the ground. but was able to identify that from the documents in court that there was a difference between the document showing what was on the ground and what had been submitted to support the application. It is certainly a strange thing that the authority was not able to verify post construction details and seemed not inclined to do so either, in order to carry out its own approval guidelines. Section 9 (6) of The NRCA Conservation Authority Act says:

"The Authority may-

(a) Grant a permit subject to such terms and conditions as it thinks fit; or

(b) Refuse to grant a permit,

and where the Authority refuses to grant a licence it shall state in writing the reasons for its decision and inform the applicant of his right under section35 to appeal against the decision."

[78] So that the NRCA, based on the Act, does have the authority to ensure that its guidelines are followed and that the bases for granting permits are adhered to, and that it is erroneous to believe that the decision to grant the permit prior to construction is the end of their responsibility.

[79] The Court has therefore concluded that the 2nd Defendant did not discharge its duty in terms of the procedure for approval for the permit and did not

discharge its duty regarding the so-called basement to ensure that the proper procedure was followed.

Issue 4- Has the proposed development breached Policy B H2 Town and country Planning (Kingston and St. Andrew and the Pedro Cays) Provisional Development order, 2017 and the KSAC confirmed development order when it granted environmental permits and permission to build in excess of 32 habitable rooms to be constructed on 0.68 acres?

[80] ***Policy B H2 Town and Country Planning (Kingston and St. Andrew and the Pedro Cays) Provisional Development Order, 2017*** provides:

"The following density ranges shall apply:

(a) Density shall not exceed 75 habitable rooms per hectare (30 habitable rooms per acre) in areas as indicated on Figure 7, with building heights not exceeding two (2) floors.

(b) Density shall not exceed 125 habitable rooms per hectare (50 habitable rooms per acre) in areas as indicated on Figure 7 and Inset Map No.1 with building heights not exceeding four (4) floors."

[81] **Policy B H2** of ***the Town and Country Planning (Kingston and St. Andrew and the Pedro Cays) Provisional Development Order, 2017*** provides for the construction of a maximum of 32 habitable rooms on 0.68 acres. This Court accepts the argument of the Claimants as the better view and interpretation of Policy B H2. Therefore, a unit described as a studio and is between 400-500 square feet is assessed for density purposes as a one-bedroom unit or two habitable rooms. A one-bedroom that is between 500-600 square feet is to be assessed for density purposes as a two-bedroom

apartment or three habitable rooms. Units over 600 square feet are to be assessed as a three-bedroom apartment or four habitable rooms.

[82] The way in which the planning permit was granted represents a situation of putting the cart before the horse. The planning permit was granted before the Claimants were given notice and a chance to object to the proposed development. The result of this is that there was no opportunity for their objections to be heard as the permit was already granted and construction had already started. Also, it is important for the Court to highlight that based on the evidence, the planning authority does not have a structured system of enforcement. This is made clear by the fact that no proper checks were done by them to ensure the actual development at 29 Dillsbury Avenue matched what was submitted in the plans. This practice of putting the cart before the horse needs to be discontinued so that the planning authority can effectively fulfil their duties under the building regulations.

[83] Therefore, the Court is of the view that all of the one-bedroom apartments which range from 1404.37-1453.02 square feet in the drawings of the development should be assessed as three bedroom units or four habitable rooms for the purposes of density. Likewise, all the two-bedroom townhouses should be assessed as three-bedroom units or four habitable rooms for the purposes of density. This would result in the development containing at least 40 habitable rooms in an area where the Provisional Order, 2017 provides for 32 habitable rooms. The development at 29 Dillsbury Avenue therefore, has an excess of 8 habitable rooms and amounts to a breach of ***Policy B H2*** of ***The Town and Country Planning (Kingston and St. Andrew and the Pedro Cays) Provisional Development Order, 2017.***

CONCLUSION

[84] The Court therefore makes the following Orders:

1. An order of certiorari is granted to quash the 1st Defendant's building and planning permission (No. 2017-02001PB00966) granted to Plexus Limited to construct a four-storey multi-family development at 29 Dillsbury Avenue, Kingston 6 in the parish of St. Andrew.
2. An order of certiorari is granted to quash the 2nd Defendant's grant of a Permit to Undertake Enterprise, Construction or Development in a Prescribed Area (No. 2018-02017-EP00246) to Raymond and Wendy McMaster in connection with a proposed four-storey multi-family development at 29 Dillsbury Avenue, Kingston 6, in the parish of St. Andrew.
3. An injunction is granted to compel the Defendants to take all necessary steps to halt all development at 29 Dillsbury Avenue, Kingston 6, in the parish of St. Andrew that is in breach of any laws, regulations or orders over which they have jurisdiction.
4. Costs are awarded to the Claimants herein to be taxed if not agreed.

……………………………….
Sonia Bertram-Linton
Puisne Judge