[2020] JMSC Civ 251

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018 HCV 02439

BETWEEN	**MICHAEL YOUNG**	**1ST CLAIMANT**
	JACQUELINE YOUNG	**2ND CLAIMANT**
	ANJULE McLEAN	**3RD CLAIMANT**
	DELROY McLEAN	**4TH CLAIMANT**
	JOY PATEL	**5TH CLAIMANT**
	NARAN PATEL	**6TH CLAIMANT**
	MARLYN GRINDLEY	**7TH CLAIMANT**
	ERROL THOMAS	**8TH CLAIMANT**
	SANYA GOFFE	**9TH CLAIMANT**
	GAVIN GOFFE	**10TH CLAIMANT**
AND	**KINGSTON AND ST ANDREW MUNICIPAL CORPORATION**	**1ST DEFENDANT**
AND	**NATIONAL ENVIRONMENTAL AND PLANNING AGENCY**	**2ND DEFENDANT**

AND	**NATURAL RESOURCES CONSERVATION AUHTORITY**	**3RD DEFENDANT**
AND	**WAMH DEVELOPMENT LIMITED**	**AFFECTED PARTY**

IN OPEN COURT

Mr Gavin Goffe and Mr Adrian Cotterell instructed by Myers, Fletcher and Gordon, Attorneys-at-Law for the Claimants.

Ms Sashawah Newby and Mr Patrick Peterkin instructed by Bennett & Beecher-Bravo and Company, Attorneys-at-Law for the 1st Defendant.

Mrs Susan Reid-Jones and Mr Andre Moulton instructed by the Director of State Proceedings for the 2nd and 3rd Defendants.

Mrs Daniella Gentles-Silvera and Ms Sidia Smith instructed by Livingston, Alexander and Levy, Attorneys-at-Law for the Affected Party.

Heard: February 6, 7, 8 and 19th February, 2019 and 17th December 2020.

Judicial Review – Whether the Claimants have locus standi to seek the relief sought in the claim – Whether the relevant Authorities acted ultra vires their statutory powers

Statutory Intepretation – Legitimate Expectation – Lack of consultation by Authority before decision made – Town and Country Planning Act – Natural Resources Conservation Authority Act – 1966 Town and Country Planning (Kingston) Development Order – 2017 Town and Country Planning (Kingston and Saint Andrew and Pedro Cays) Provisional Development Order

CORAM: G. FRASER, J

The Parties

[1] The claimants are residents and/or registered proprietors of properties situated at Birdsucker Drive and Lloyds Close, and are neighbouring the premises on which the disputed four-storey multi-family complex has been constructed by WAMH Development Limited. The claimants contend that the development is in breach of the ***Town and Country Planning Act*** ('TCPA') and the 2017 ***Town and Country Planning (Kingston and Saint Andrew and Pedro Cays) Provisional Development Order***.

[2] The 1st defendant is the Kingston & St. Andrew Municipal Corporation ('KSAMC') which is the local planning authority for Kingston and St. Andrew and which has responsibility to enforce planning laws and regulations within its jurisdiction.

[3] The 2nd defendant is the National Environment and Planning Agency ('NEPA'); an executive agency actuated under the ***Executive Agencies Act***. NEPA has the responsibility to carry out the technical and administrative mandate of three statutory bodies, namely the Natural Resources and Conservation Authority, the Town and Country Planning Authority and the Land Development and Utilisation Commission ('LDUC'). Accordingly, NEPA's mandate is to promote sustainable development by ensuring protection of the environment and orderly development in Jamaica. The Agency is to ensure that,*"Jamaica's natural resources are being used in a sustainable way and that there is broad understanding of environment, planning and development issues, with extensive participation amongst citizens and a high level of compliance to relevant legislation"*[1]. In accordance with their legislative authority, NEPA operates under the following statutes:

I. The Executive Agencies Act;

[1] http:/www.nepa.gov.jm accessed on April 6th 2020 at 1:00 pm

II. ***The Natural Resources Conservation Authority Act;***
III. ***The Town and Country Planning Act;***
IV. ***The Land Development and Utilization Act;***
V. ***The Beach Control Act;***
VI. ***The Watersheds Protection Act;***
VII. ***The Wild life Protection Act; and***
VIII. ***Endangered Species (Protection, Conservation and Regulation of Trade) Act.***

[4] The 3rd defendant is the Natural Resources and Conservation Authority ('NRCA'); which was established to, amongst other things, take steps which are necessary for the effective management of Jamaica's physical environment so as to ensure the conservation, protection and proper use of its natural resources. Their mission is, "*[t]he monitoring and protection of our environment is important, not just for us but for future generations".*[2]

[5] The Party Directly Affected is WAMH Development Limited ("WAMH") which is the registered proprietor of the premises on which the apartment complex is being built and the developer of the said apartment complex.

Background

[6] By way of a Fixed Date Claim Form, filed on 20th July 2018, the claimants seek to challenge the decisions made by the KSAMC, NEPA and NRCA in granting planning/building approval and an environmental permit respectively to WAMH. WAMH constructed a four-storey, multi-family development comprising of 12 one-bedroom units at 17 Birdsucker Drive, Kingston 8, St. Andrew ("the premises").

[7] The premises were previously owned by M&M Jamaica Limited ('M&M'). Whilst M&M was the registered proprietor of the premises they had sought and obtained

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[2] Ibid

on 27th June 2016, approval to construct a multi-family residential development consisting of twelve (12) studio apartments on a single two-storey building. An environmental permit was also obtained by M&M in relation to that construction proposal. Subsequently, the premises was sold and transferred to WAMH on 16th January 2018 and a second application was made to the KSAMC and their approval sought for the construction of twelve (12) one bedroom units on a single three-storey building on the premises.

[8] This second application was made by WAMH and treated by the KSAMC as an amendment to the 2016 application made by M&M. At the time of the 2016 application, the maximum permissible density was 30 habitable rooms per acre as prescribed in the 1966 ***Town and Country Planning (Kingston) Development Order*** ('***the 1966 Development Order***'). The density was increased to 50 habitable rooms per acre under the 2017 ***Town and Country Planning (Kingston and Saint Andrew and Pedro Cays) Provisional Development Order*** ('***the 2017 Provisional Development Order***'). There is a dispute amongst the parties as to whether this latter Order was in effect at the material time and consequently whether it was a relevant consideration for the defendants when they issued their permits to WAMH.

[9] The second planning/building approval, was granted to WAMH in December 2017, prior to the commencement of the construction process. The grant of the environmental permit was however, not issued until May 2018, after the building process was well underway. Moreover, it was not until May 2018, following a site warning notice and a cessation order issued by NEPA, that WAMH applied for and obtained an environmental permit and licences.

The Claim

[10] The claimants being dissatisfied with the decisions of the KSAMC and NEPA to grant the relevant permits to WAMH, filed an ex-parte application for leave to apply for judicial review on 27th June 2018. On the 9th July 2018, the application for leave to

apply for judicial review was heard and the applicants were granted leave to apply for judicial review.

Relief Being Sought

[11] Subsequent to the granting of the court's orders, on the 20th July, 2018 the claimants filed a Fixed Date Claim Form and Particulars of Claim seeking the following reliefs:

> *"I. An order of certiorari to quash the 1st Defendant's approval to construct a three-storey multifamily development consisting of twelve one-bedroom units at 17 Birdsucker Drive, Kingston 8 in the parish of Saint Andrew.*
>
> *II. An order of certiorari to quash the 2nd Defendant's grant of an environmental permit to WAMH Development Limited in connection with a proposed three storey multifamily development consisting of twelve one-bedroom units at 17 Birdsucker Drive, Kingston 8 in the parish of Saint Andrew.*
>
> *III. An order of mandamus to compel the Defendants to take steps to halt all construction at 17 Birdsucker Drive, Kingston 8 in the parish of Saint Andrew that is in breach of any laws, regulations or orders over which they have jurisdiction.*
>
> *IV. Costs to be costs in the claim."*

[12] In August 2018, the claimants applied for an interlocutory injunction *"to halt the construction of a development at 17 Birdsucker Drive, Kingston 8, in the parish of Saint Andrew being undertaken by the 4th Respondent [WAMH] pursuant to an illegally granted building permit and environmental permit by the 1st and 2nd and/or 3rd Respondent respectively".* The claimants' application for injunctive relief was unsuccessful. However, KSAMC halted construction at the premises, but they did not revoke the building permission that is the subject matter of this claim. Similarly, the NRCA did not revoke the environmental permit and licences issued under their authority. Consequently, the construction process continued.

Tne Case for the Claimants

[13] In support of its case the claimants relied on the several affidavits filed by and on their behalf and various attachments exhibited thereto. Due to the number of affidavits that were presented in this case, this court, as a matter of convenience and economy has elected to reproduce some portions of the evidence from the

affidavits in the analaysis of this judgment rather than under this heading. This however, is not an indication that the court has neglected to consider any portion of the claimants' evidence.

The Grounds

[14] The claimants have contended that the building permission granted by KSAMC and the environmental permit granted by the NRCA are susceptible to judicial review for the following reasons:

> *"1. The building approval granted by the 1st Defendant was done in breach of the Natural Resources Conservation Authority Act and the Town and Country Planning Authority Act which require an environmental permit to be issued prior to consideration by the 1st Defendant.*
>
> *2. The building approval granted by the 1st Defendant and the Enviornmental Permit issued by the 2nd and/ or 3rd Defendants are illegal as the proposed development is in breach of the Town and Country Planning (Kingston) Development Order, 1966 and the Town and Country Planning (Kingston and Saint Andrew and Pedro Cays) Provisional Development Order, 2017.*
>
> *3. The 2nd and/ or 3rd Defendant acted in bad faith and in breach of the principles of fairness, natural justice and the Claimants' legitimate expectations when it agreed to hear the Claimants' concerns prior to considering the application by WAMH Development Limited, but proceeded to consider and grant the environmental permit without affording the Claimants the promised opportunity to be heard.*
>
> *4. In granting the enviornmenral permit, the 2nd and/ or 3rd Defendants failed or refused to consider relevant and material considerations, including the legitimate concerns of the Claimants, and the consistent breaches of the law and the 2nd and/ or 3rd Defendants directives committed by WAMH Development Limited.*
>
> *5. The 2nd and/or 3rd Defendants' decision to grant the environment permit was affected by the conflict of interest of one of its directors or advisors who has or had an interest in the land and the outcome of the environmental permit.*
>
> *6. The Claimants are directly affected by the Defendant's decisions.*
>
> *7. Other than judicial review, there is no other suitable remedy available to the Claimants.*
>
> *8. The Claimants are within the prescribed time limit to file this Fixed Date Claim Form."*

The Case for the Defendants

[15] The defendants and WAMH have each relied on a number of affidavits and exhibits in advancing their case, this court has taken a similar approach and treated with the defendants' evidence in the same thorough manner as that given to the claimants' evidence. As opposed to recounting the evidence of each individual affiant, the court will make reference in its analysis to particular aspects of any evidence where relevant. I wish to iterate that this approach in no way is a negative reflection of the affidavit evidence proffered by the defendants and WAMH in this matter.

The Issues to be Resolved

[16] The following are the issues gleaned as arising from the evidence and submissions of the several parties in this matter and which the court is to determine:

a) Whether the claimants have *locus standi?*

b) Whether the NRCA/NEPA acted in breach of its statutory duty when it granted the environmental permit to WAMH after commencement of the construction process?

c) Whether the claimants had a legitimate expectation of being consulted by NEPA and the NRCA, as promised, prior to them considering WAMH's application for an environmental permit and whether the failure to consult as promised affects the validity of the environmental permit?

d) Whether in fact this permit issued by NEPA was in breach of the maximum density restrictions for the area?

e) Whether the building permission granted by the KSAMC is unlawful because there was no compelling reason why it ought to have been granted and does this, therefore, amount to irrationality?

f) Whether the KSAMC took all the material considerations into account including the ***2017 Provisional Order*** when it granted the building approval

to WAMH? In particular, is there evidence that KSAMC properly considered and applied the ***2017 Provisional Development Order*** in December 2017?

g) Whether the building permission granted by the KSAMC prior to the issue of an environmental permit was unlawful, and if so whether that defect was cured by the subsequent grant of the environmental permit and licence by the NRCA/NEPA?

h) Whether KSAMC had a duty to refer the application by WAMH to the Town and Country Planning Authority or the NRCA prior to the grant of planning permission.

The Clamants' Submissions

[17] The main thrust of the claimants' submission is that the planning permission issued to WAMH was unlawful as no environmental permit was obtained prior to its issuance as is required by section 11(1A) of the ***TCPA*** .

[18] The claimants further submitted that the KSAMC failed to have regard to the provisions of the ***2017 Provisional Development Order*** as required by s. 11(1) of the ***TCPA*** when it approved WAMH's application for building permission in December 2017. Further, that there is no documentary evidence that the provisions of the Development Order were considered and/or applied by the KSAMC. It was also submitted that the ***2017 Provisional Development Order*** which was gazetted on 8th May 2017 came into effect some six months before the building permit was granted to WAMH and was, therefore. relevant to the approval process.

[19] KSAMC ought not to have granted an approval as numerous breaches of the Order had been committed, the breaches alleged are said to include the following:

a) no multi-family development should have been permitted on land smaller than ½ acre without compelling reasons being shown by the applicant.

b) the maximum density restrictions (of 50 habitable room per acre) for the area were exceeded when the KSAMC approved the application for 26 habitable rooms on a lot smaller than half acre.

c) Applying ***SP H30*** of the 2017 ***Provisional Development Order***, each unit should have been considered to be a three-bedroom unit (or 4 habitable rooms) for density purposes, resulting in a density of 48 habitable rooms on less than half acre.

d) No environmental permit had been applied for or obtained by the developer as required by the ***TCPA*** prior to the grant of building permission.

[20] The claimants have also contended, that the application by WAMH should not have been treated as an amendment to M&M's application as the statutory regime had changed between 2016 and December 2017 when the subsequent application was granted. The application should, therefore, have been treated as a fresh application.

[21] Counsel for the claimants, Mr Goffe, articulated that the KSAMC purported to approve an amended application whereas pursuant to Part 6 of WAMH's application it was identified as being a new application and nowhere therein did it say that the second application sought to amend the previous application. As it appears from the affidavit evidence of Shawn Martin filed 13th August 2018, the KSAMC treated with WAMH's application as an "amendment" and not a fresh application. Mr. Martin stated that 12 studios were originally approved, and the amendment was for 12 one bedroom units on a single three-storey building. These utterances by Mr. Martin, according to the claimants, are demonstrative of his erroneous appreciation of the facts as they are discrepant with the decision of the Council.

[22] The Council's decision shows that the original approval to M&M was for 12 one bedroom units. The second application was also for 12 one bedroom units, but with a redesign of the floor layout, site spatial layout and modified architecture. Hence the new approval was for *"twelve (12) – one bedroom units as was previously*

approved in a single three storey building with parking provided at grade beneath a section of the said building".

[23] The claimants expressed that the KSAMC and in particular Mr. Shawn Martin have neither been honest nor forthright with the court and are conflicted by self-interest, in that they have declared that they will be prejudiced if the development is halted. This conduct and/or the conflict of interest disqualifies them from exercising any discretion over the application in question.

[24] The claimants allege that the KSAMC acted ultra vires, as it lacked the statutory authority to exercise any discretion to vary the minimum standards specified in the **1966 *Development Order*** or the **2017 *Provisional Development Order***, by virtue of section 12 (1A) of the ***TCPA***. The claimants submitted that the provisions of section 12(1A) requires all applications not in conformity with the relevant Development Order to be referred to the Town and Country Planning Authority. This assertion is predicated on the provisions of section 12 (1A) of the ***TCPA*** which provides that:

> *"Where an application to a local planning authority seeks permission for a development which is not in conformity with the development order, that application shall be deemed to be one required to be referred by the local planning authority to the Authority under this section.".*

[25] Alternatively, the claimants submitted that assuming the KSAMC had the power to deal with the application itself (and was not required to refer it to the Town and Country Planning Authority), it nonetheless failed to take into account the proper factors and policies that applied to the exercise of that discretion, that is to say, the proper procedure as outlined by the NRCA in the affidavit of Leonard Francis.

[26] It was submitted by the claimants that they had a legitimate expectation of being consulted prior to the grant of the environmental permit based on the promise of the CEO of NEPA, and he reneged on this promise. It was further submitted that it cannot be said that consultation would have made no difference to the outcome, particularly where the public opinion and the impact of the proposed development on the community must be relevant considerations for the NRCA. The case of ***The***

Northern Jamaica Conservation Association and Others v Conservation Authority and The National Environment and Planning Agency (unreported), Supreme Court, Jamaica, Claim No. 2005 HCV 3022, judgment delivered on 16 May, 2006) was relied on by the claimants in support of this submission. In that decision Sykes J (as he then was) at paragraph 38 enunciated that:

> *"[38]… a statute may impose a duty to consult. At other times the decision maker decides to consult where there is no statutory duty to consult. The law now requires that any consultation embarked upon must meet minimum standards. The standard is the same whether the consultation arises under statute or voluntarily undertaken by the decision maker."*

[27] The claimants further submitted that based on the NRCA's own policies and guidelines it is clear that they would not have granted the building permission had the application been dealt with by it and not by the KSAMC. It is, therefore, not a proper case for the application of the *de minimis* waiver based on the NRCA's policy documents, as:

i) the draft policy with a maximum recommended waiver of 30% is exceeded in this case;

ii) No justification for the application of the waiver was advanced by the developer, as required by the NRCA's draft policy;

iii) None of the "material circumstances and considerations" stated in the variation policy document applies in the present case;

iv) None of the factors such as lot size, maximum density requirements**,** or character of the area operated in favour of the waiver.

Submissions on behalf of KSAMC

[28] The KSAMC has raised a point *in limine* pursuant to Part 56.2 (1) of the ***Civil Procedure Rules 2002*** ('CPR'), that the claimants have not shown sufficient interest in the actual subject matter, specifically that they have not shown that they have been adversely affected by the decision of the KSAMC to grant planning permission

to WAMH. Accordingly the claimants have no *locus standi* to bring this claim for judicial review.

[29] The KSAMC also submitted that contrary to the complaints of the claimants, there has been no breach of the ***NRCAA*** nor the ***TCPA*** as WAMH had obtained the requisite environmental permit from NEPA. Alternatively, counsel submitted, if the court finds that there has been a breach of the ***TCPA*** and ***NRCAA*** this would not be fatal to the planning and building approval granted and would, therefore, not automatically render the KSAMC's approval null and void.

[30] The KSAMC averred that the statutory scheme is to facilitate compliance with orderly development, and this position, they submitted, is supported by statutory provisions. In particular, section 11(1A) of the ***TCPA*** and section 9 of the ***NRCAA*** when read together prescribe the procedure for obtaining planning permission for construction or development which requires an application for a permit under the ***NRCAA***. The procedure outlined in the relevant sections is directory only and not mandatory. Accordingly, once there has been substantial compliance, the statutory mandate for orderly development has been met and there is effectively no breach invalidating the approval. In support of their submission in this regard, the KSAMC sought to rely upon the decision of ***Hoip Gregory v Vincent Armstrong*** [2012] JMCA App 21. They also relied on the case of ***Coney v Choyce*** [1975] 1 ALL ER 979 where Templeman, J provided sage guidance for determining whether a provision is mandatory or directory. Counsel on their behalf submitted that the known authorities establish that the court must look to the purpose of the provision and its relationship with the scheme, subject matter and objective of the statute in which it appears.

[31] The KSAMC has also submitted that the intention of the legislature was to ensure that prescribed developments are undertaken with the requisite permission of the relevant authority, in this case the KSAMC. The legislation should, moreover, be read in a purposive way to give effect to this scheme. Therefore, regardless of the stage that the development has reached or failure by any person to comply with the provisions to obtain the relevant approvals, the legislation does not invalidate

planning permissions granted prior to the environmental permit. Accordingly, the planning and building approvals granted by the KSAMC are not invalid.

[32] It was also advanced by the KSAMC that the fact that the NRCA has the authority to issue a cessation order as an enforcement measure for non-compliance with the requirements of section 9(2), which can compel developers to obtain a permit, this is indicative that the requirement in the ***TCPA*** to obtain an environmental permit prior to planning permission is directory rather than mandatory under section 13 of the ***NRCAA.***

[33] The KSAMC has further submitted that taking the claimant's argument to its logical conclusion would mean that the NRCA would be unable to have a non-compliant developer remedy a breach, and if a development was commenced without an environmental permit, then the development application process would have to commence *de novo* and the developer would have to resubmit an application for building and planning permission. Such a process would be inconsistent with efficient public administration. Further, the fact that no sanction is prescribed for failing to obtain planning permission prior to commencement of construction is indicative of the section being merely directory. In these circumstances where WAMH having obtained an environmental permit, albeit retrospectively, is now in substantial compliance with the provisions of the ***NRCAA***. Consequently, any irregularity in the approval process would have been remedied by the acts of the relevant government authorities in keeping with the statutory scheme of both the ***TCPA*** and ***NRCAA***. In public law, the emphasis is on substance rather than form and in support of this proposition, counsel relied on the case **of R v Monopolies and Mergers Commission Ex parte Argyll Group Plc** [1986] 2 All ER 257**.**

[34] Counsel also posited that the building and planning approvals granted to WAMH as an amendment to a previously approved multi-family residential development would not warrant the interference of the court because an environmental permit was eventually issued to WAMH for a 12 one bedroom units in May 2018, and it is clear that the outcome would have been the same if the environmental permit had been

applied for first. Therefore, the decision to grant the building and planning permission is not vitiated and no remedy is warranted by the court. Counsel relied on the cases of ***Smith v North East Derbyshire Primary Care Trust*** [2006] EWCA Civ 1291 and ***BX v Secretary of State for the Home Department*** [2010] EWCA Civ 481.

[35] As it relates to the breaches of the Development Orders, the KSAMC submitted that there were no breaches of the ***1966 Development Order*** and the ***2017 Provisional Development Order***. Pursuant to section 11 (1) of the ***TCPA***, the local planning authority has a discretion to exercise and in doing so must have regard to the provisions of the Development Order to the extent that it is material and to any other material consideration. The KSAMC further submitted that in exercising its discretion it must consider a number of material considerations including the Development Order but it is not bound to follow a rigid set of criteria.

[36] Counsel argued that the **2017 *Provisional Development Order***, although gazetted has not been confirmed to have full legal effect and as such the ***1966 Development Order*** remains in effect. In any event, there was no beach to **Policy B H2** of the ***2017 Provisional Development Order*** as it permits density of 50 habitable rooms per acre with building heights not exceeding 4 storeys.

[37] Counsel urged on the court that the ***1966 Development Order*** contains guidelines and policies which should guide development and as such the planning authority has the power to vary, once it is inconsistent with the stated objectives and with good planning practices. Counsel concluded on this issue that the KSAMC acted within the parameters of planning law and practice in granting the approvals to WAMH.

[38] Counsel further submitted that there is no evidence before the court that the claimants have suffered any harm, loss, damage or expense as a result of the alleged breaches, and alternatively that if there are any breaches not admitted then there is no prejudice to the claimants. Counsel submitted that judicial review is a remedy of last resort as indicated in the decision of ***R (Cart) v Upper Tribunal*** [2011] 4 All ER 127. Counsel contended that the relief sought should be refused as the

claimants had an adequate alternative remedy available to them, which they ought to have pursued instead of filing a claim for judicial review.

[39] Counsel finally submitted that even if the court finds that there are breaches, the court should not grant the orders as sought as it would serve no practical purpose, given that the environmental permit has already been obtained by WAMH, and further, an amended application has been submitted for consideration in relation to identified breaches.

The Submissions of NEPA and NRCA

[40] NEPA and the NRCA succinctly argued that the relevant environmental permit was not illegal. They have refuted that they failed or refused to consider relevant and material considerations. They have submitted that all relevant factors were taken into consideration and the fact that a warning notice and the cessation order were issued after at least 2 inspections, is evidence of the consideration given to the legitimate concerns of the claimants and the breaches of law allegedly committed by WAMH.

[41] Counsel Mrs. Reid-Jones on their behalf, directed the attention of the court to the affidavit evidence of Leonard Francis, particularly those paragraphs relative to Policy SP H31 and Policy SP H32 of the ***2017 Provisional Development Order.***

[42] Counsel further relied on the evidence of their witness Mr. Francis, that when the 2017 *"[o]rder was prepared the intention with respect to policy SP H31 and SPH32 was that variations in densities can be allowed depending on the design of the development, availability of the necessary infrastructure, character of the area and environmental controls"*. On the strength of Mr. Francis' affidavit the NEPA and the NRCA posited that this *"variation in density is not unusual and was contemplated during the preparation of the Development Order and the Variation Document"*. Therefore, the NRCA *"assessed"* WAMH's development proposal taking account of the Order and *"properly approved the environmental permit"* that NEPA issued.

[43] NEPA and the NRCA also relied on the evidence of their witness Mr. Gregory Bennett, an Urban and Regional Planner employed to NEPA. This witness spoke about the receipt of WAMH's environmental permit and licences applications on 2nd May 2018. He asserted that the said applications *"were then processed for review … and circulated to the relevant agencies… for review and comments".* Despite the fact that, WAMH's applications were for environmental permits and licences and the KSAMC had already granted building and planning permission, NEPA carried out a fulsome technical review and considered the environmental factors as prescribed by the development standards of the ***1966 Development Order*** and the ***2017 Provisional Development Order***, as well as, the Development and Investment Manual. The applications were conditionally approved.

[44] NEPA contends that, the conditional approval that they granted to WAMH was an option that was available to them and the conditions that WAMH was expected to address, included drainage, dust control, noise abatement and the management of solid waste disposal.

[45] In relation to the claimant's averment of bad faith, breach of the principles of fairness, breach of natural justice and the breach of legitimate expectation, NEPA and the NRCA conceded that Mr. Peter Knight, the CEO of NEPA had received complaints about the development being undertaken by WAMH at the premises. It was also conceded that Mr. Knight had agreed to meet with the claimants prior to the NRCA's Board Meeting relative to WAMH's application for environmental permit and licences being granted. Mr. Knight however was *"regrettably unable to honour his promise"*.

[46] Counsel, on behalf of NEPA and the NRCA have submitted that the meeting requested by the claimants *"related to building approval which is the purview of KSAMC, as that body has sole responsibility for issuing building permission".* It was, therefore, not vital for the claimants to meet with Mr. Knight as he had no control over the actions of the KSAMC, so that the claimants' concern could not properly be addressed by him in any event. In all the circumstances, therefore, Mr. Knight's

inability to meet with the claimants did not amount to bad faith nor could any legitimate expectation arise.

[47] As it relates to the prayer of the claimants for orders of certiorari, counsel, Mrs. Reid-Jones, submitted that this is a discretionary remedy which will be granted by the court to quash a decision of a lesser tribunal which is ultra vires, or outside its powers. It was further advanced that NEPA and the NRCA had done all they could to ensure that the development was done in accordance with the ***NRCAA***. Counsel submitted that as soon as it came to the attention of NEPA that the property was transferred to WAMH, and as the environmental permit issued to the previous owners was not transferrable, appropriate action was taken, firstly by way of a site warning notice and subsequently the issuance of a cessation order.

[48] As it relates to the order of Mandamus sought to compel the defendants to take steps to halt all construction, counsel referred the court's attention to the text, ***Administrative Law*** by Wade and Forsyth, 10th edition, at pages 521 and 523. Counsel submitted that mandamus can only be issued to compel an authority to do its duty and since NEPA and the NRCA do not have a duty of construction, such relief ought not to be granted by the court to compel them to halt construction at the premises.

Submissions on behalf of WAMH

[49] WAMH has submitted that the building permission granted by the KSAMC was not subject to section 11 (1A) of the **TCPA** and as such there is no requirement to obtain environmental permits prior to obtaining building permission. Counsel, Mrs. Gentles-Silvera on WAMH's behalf, submitted that, what WAMH applied for was an amendment to the building and planning permission which was previously granted on February 16, 2016 to M&M. Counsel posited that WAMH's particular circumstances falls to be determined pursuant to sections 15 and 22 of the TCPA.

[50] In particular, the effect of section 15 (4) is that any planning permission granted by KSAMC attached to the land and, therefore, whomever subsequently owns the land,

is entitled to the benefit of any existing planning permission, hence the planning and building permissions granted to M&M were transferred to WAMH on sale of the premises and transfer of the title. WAMH, therefore, only needed to apply for an amendment rather than to apply for new planning and building permission. Counsel submitted that section 11 of the TCPA does not apply to these circumstances and KSAMC was not obliged before issuing the amended approval to ensure that the environmental permit had been granted by NEPA. The court notes that counsel, Mrs. Gentles-Silvera, cited no authority for this latter proposition.

[51] Counsel conceded that an environmental permit is not transferable and thus the permit granted to M&M could not be transferred to WAMH. The sanctions for failure to obtain such a permit and to commence construction is provided for under section 13(1) of the ***NRCAA***. Counsel contended that the statute obviously contemplates a situation where a development has proceeded without an environmental permit in which case a cessation order should be issued and that was done in this case on the 14th May, 2018. Counsel further submitted that the failure to get a new environmental permit before the grant of the amendment to the planning permission did not invalidate the permission from KSAMC nor the environmental permit which was finally granted to WAMH on 31st May 2018. Again this court notes that counsel, Mrs. Gentles-Silvera, cited no authority for this latter proposition.

[52] Alternatively, counsel submitted that, it would be futile to quash the amended planning permission issued to WAMH in December 2017 as it has been overtaken by events. Specifically, that an environment development permit was in fact issued in May 2018 and both permits are now in existence. If these approvals/permit are quashed, it was submitted, it is highly probable that the KSAMC and NRCA/NEPA will grant the same permits all over again. Counsel relied on the Judicial Review Handbook 6th edition by Michael Fordman and the cases of ***R (Edwards) v Environmental Agency*** [2009] 1 ALL ER 57 and ***R v Horseferry Road Magistrates' Court Ex parte Bennett*** *[1994] 1* A.C 42.

[53] Counsel contended that the claimants' case was primarily predicated on the concerns of density and environmental impact, privacy, lighting and airflow. These issues, she said, according to the affidavit evidence of Mr. Gregory Bennett, were contemplated before a decision was made by NEPA. It would, therefore, be futile to quash the decisions of the KSAMC, NEPA and NRCA. Counsel urged the court not to quash any of the approvals/permits if it finds that there is no material capable of producing a different result, from that which presently obtains. In support of this submission, counsel relied on the case of ***R (Martin) v Parole Board*** [2003] EWHC 1512 (Admin).

[54] As it relates to the provisions of section 11(1A) of the ***TCPA*** counsel has adopted the submissions of the defendants that is to say, the provision is directory and not mandatory. Counsel also submitted that the intention and purpose of the legislation must be taken into consideration, as well as, the consequences of breach of the provision in determining whether the provision was mandatory or directory. Counsel relied on the case ***Secretary for Trade v Landgridge*** [1991] Ch. 402**,** ***Simpson v Edinburgh Corporation*** 1961 SLT 17, ***Enfield LBC v Secretary of State for the Environment*** [1975] JPL 155 and ***Stringer v Minister of Housing and Local Government*** [1970] 1 WLR 1281.

[55] Counsel on behalf of WAMH further submitted to the court that it *would "be a grave detriment to WAMH if the Claimants are granted orders to quash the decisions of the defendants"*, as WAMH has expended $190,000,000.00 to acquire the land, building material, hire architects, engineers and surveyors and to hire sub-contractors to carry out plumbing, electrical and cabinetry. WAMH has also secured a loan of a substantial amount from its investors and the building at the time of the application for judicial review was then *"99% completed and agreements for sale signed and deposits collected from purchasers".*

Law and Analysis

The issue of *locus standi*

[56] The court hearing the application for leave to apply for Judicial Review, had ruled on the issue of *locus standi* raised *in limine*. Nonetheless, the KSAMC has again raised the issue for this court's determination. The KSAMC has complained that pursuant to part 56.2 (1) of the CPR, the claimants have not established that they are "…*any person, group or body which has sufficient interest in the subject matter of the application*", and that the claimants have not specifically shown that they have been "adversely affected*"* by the KSAMC's decision. Accordingly they have no standing to bring the instant claim".

[57] The claimants have initiated this review process and have challenged the actions of the relevant authorities which have made the disputed decsisions. It is, therefore, incumbent upon the claimants, to establish that they are persons who have the necessary standing to bring this claim. The court at this juncture, therefore, finds it necessary, to make a ruling on this issue.

[58] The jurisdiction of this court to make an order of certiorari, and other prerogative orders, is grounded by section 52 of the ***Judicature (Supreme Court) Act***, ('***Supreme Court Act***'). By virtue of section 28 of the ***Supreme Court Act***, the court's jurisdiction is exercised in matters of procedure and practice in the manner stipulated by the Act and, for present purposes, the ***CPR***. It is to be noted that the ***Supreme Court Act***, does not reference the question as to how a litigant should approach the court or that of standing. It is decisions of the court as gleaned from the enunciation of judges which have indicated that standing is a matter of practice in the exercise of the court's discretion. A case in point, ***R v Inland Revenue Comrs ex p. National Federation of Self-employed and Small Businesses Ltd***. [1982] AC 617, 638B. This authority was the benchmark in England when the present judicial review procedures in Jamaica were instituted.

[59] The CPR came into effect on the 1st January 2003. The ***CPR*** heralded a new, simplified procedure for applications for judicial review and the previous rules relating to standing where replaced. The CPR was promulgated by the Rules Committee of the Supreme Court, pursuant to section 53 of the ***Supreme Court Act.*** Following the provisions of the Interpretation Act, "'rules of court,' when used in relation to any court, means rules made by the authority having for the time being power to make rules or orders regulating the practice and procedure of the court." Accordingly, the ***CPR*** has the force of law insofar as practice and procedure are concerned.

[60] Under the rules, any person, group or body having "sufficient interest in the subject matter of the application" may apply for judicial review (Rule 56.2 (1)). By virtue of Rule 56.2 (2), this "includes"-

> *"(a) any person who has been adversely affected by the decision which is the subject of the application;*
>
> *(b) any body or group acting at the request of a person or persons who would be entitled to apply under paragraph (a);*
>
> *(c) any body or group that represents the views of its members who may have been adversely affected by the decision which is the subject of the application;*
>
> *(d) any statutory body where the subject matters falls within its statutory remit;*
>
> *(e) any body or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application; or*
>
> *(f) any other person or body who has a right to be heard under the terms of any relevant enactment or the Constitution."*

[61] My first observation is that Part 56.2 (1) of the ***CPR*** speaks to the eligibility of person(s) to make an application for judicial review. The reasonable interpretation that I have gleaned, is that, eligible persons are interested person(s), albeit, the term interested person is not used specifically. Counsel for the KSAMC has submitted that the claimants have not established that they have been adversely affected and, therefore, they have not established *locus standi*.

[62] Whilst persons who are "adversely affected" are listed as one of the sub-sets of interested persons at Part 56.2 (2), the governing criteria is found in Part 56.2 (1) which states that these are persons with sufficient interest in the subject matter of the application. It is to be noted that Part 56.2 (2) in seeking to define eligible persons uses the phrase "includes". This to my mind, means the groups of persons eligible to bring a claim is not closed, but would extend to other eligible persons who qualify as interested persons.

[63] On closer reading of rule 56.2 (2) (f) further guidance is provided to this court as to the category of claimants who are eligible to apply for judicial review. The CPR contemplates *"any other person or body who has a right to be heard under the terms of any relevant enactment or the Constitution".*What this court should, therefore, determine is whether the claimants have a right to be heard under the terms of ***The Constitution***, or other statute, and would qualify as interested persons having regard to subparagraph (f). Having examined the provisions of ***The Constitution***, I was not persuaded that any standing would be accorded to the claimants in relation to the issues joined with the dfendants. I must, therefore, look to any other enactment relevant to these proceedings, in particular, the ***TCPA*** and the ***NRCAA***. I also remind myself, that the threshold question to consider here, is the sufficiency of the interest of the applicant in the challenged matter as indicated by E. Brown J, in the Full Court decision of ***Director of Public Prosecutions v Senior Resident Magistrate For The Corporate Area***; [2012] JMFC Full 3.

[64] Upon a careful examination of the pleadings it is clear to me that all the claimants are persons who are owners and/or long term occupiers of the properties situated at Lloyds Close and Birdsucker Drive, which are in close proximity to the disputed premises where the apartment complex is being constructed. There can be no disagreement that the building and construction activities being carried out by WAMH will result in material changes to the premises at 17 Birdsucker Drive and by extension the community. Undoubtedly, owners and occupiers of neighbouring and adjoining premises would be affected by such changes.

[65] Specifically, the claimants reside and are proprietors of premises at numbers 20 and 22 Birdsucker Drive and numbers 1, 2 and 4 Lloyds Close. As it relates to the location of numbers 2 and 4 Lloyds Close these are situated east of the disputed premise. The freeholds at numbers 20 and 22 Birdsucker Drive are located across the street from the disputed premises and number 1 Lloylds Close is also in close proximity to it.

[66] Another important consideration is that the claimants have been in occupation of their premises in excess of thirty (30) years except the 9th and 10th claimants who have been in occupation since 2009. All these claimants by virtue of their ownership and physical occupation of the neigbouring premises qualify as interested parties, being persons in whom is vested freehold estate in land within the locality to which the development/building order relates. The claimants, as landowners in the community in which the premises is situated, are qualified as interested parties regarding decisions which would affect the infrastructure, character of the area and changes to the existing environment.

[67] Thus the court in determining the *locus standi* of the claimants also took into consideration the provisions of the ***TCPA***, which makes provision for objections to be made regarding development orders. For clarity I have made reference to section 5 (2) of the ***TCPA*** as to what is meant by the expression "development". Section 5 (2) states:

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

[68] It would seem that the expression "development" as used throughout the statute, has been used interchangeably with other expressions to include building and construction. References are made to "provisional development order" in sections 5 (1) and 6 (1); and these appear to be orders which are approved, prepared and gazetted by the Authority. There are also references to the expressions "develop" and "development" in other sections, such as 5, and 15, that connotes, building, or

planning permission granted by the Authority upon application. This in my view lends a certain fluidity in ascertaing the meaning of certain words, phrases and expressions.

[69] When section 2 (the interpretation section) is taken into account,"planning permission" means the permission for a development which is required by virtue of section 10; and the expression "development" is ascribed the meaning assigned to it by section 5 and "develop" shall be construed accordingly. Although the statute seems to be somewhat circular as it relates to these words, expressions and phrases, it is my view that a reasonable interpretation of development order with reference to section 5, would include the activities undertaken by WAMH at 17 Birdsucker Drive and which has been permitted by KSAMC.

[70] Who then are the persons that can legitimately object to a development being undertaken at the disputed premises? The answer is to be found within the provisions of the legislation itself. Pursuant to section 6 (3) of the ***TCPA***, it would be an "interested person" The section provides that:

> *"(3) In this section "interested person" means-*
>
> *(a) any local authority concerned;*
>
> *(b) any person in whom is vested any freehold estate in any land within the locality to which the provisional development order relates;*
>
> *(c) any person in whom is vested any term of years in any land in such locality, the unexpired portion of which on the day on which such objection is made is not less than three years, or who holds an option to renew such lease for a period of not less than three years;*
>
> *(d) any person who is entitled under the Water Resources Act to exercise any right in relation to the use of any public water in a public stream within the locality and whose interest therein will be affected by the application of the order."*

[71] The claimants, therefore, qualify as interested persons pursuant to paragraphs (b) and (c) and would qualify as persons who have a right to be heard by way of judicial review under the terms of a relevant enactment.

[72] In relation to the issue of standing, E. Brown J in ***Director of Public Prosecutions v Senior Resident Magistrate For The Corporate Area,*** supra; at paragraph 118 adumbrated that:

> *"The question of the sufficiency of the interest of the applicant in the subject matter of the application is not an esoteric one to be considered in the abstract".*

The learned judge also relied on the expressions of Lord Wilberforce**,** in ***Regina. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed And Small Businesses Ltd***. [1982] AC 617,630; who determined that sufficiency of interest is any case which is more than frivolous.. The Law Lord indicated that in considering the issue of sufficiency of interest:

> *"it will be necessary to consider the powers or duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed".*

The learned judge at paragraph 119 continued and agreed with the view of the learned authors H.W .R. Wade & Forsythe ***Administrative Law*** 7th edition, supra pp. 708- 709, that:

> *"[t]he rule as enacted suggests that the test is to be a broad one, designed to turn away futile or frivolous applications only." Equally poignant is the learning that, "by requiring the interest to be 'in the matter to which the application relates' the rule suggests … that standing is to be related to the facts of the case rather than (as previously) to the particular remedy."*

[73] There being no dispute that the activities being carried out by WAMH constitutes building and construction and the making of material changes at the premises which will invariably affect the neighbouring claimants' freeholdings; on these footings, I hold, that the claimants are interested persons within the meaning of the ***TCPA*** and ***CPR***. I further make the finding that in all the foregoing circumstances, the claimants have successfully overcome the first hurdle as regards their status and thus have *locus standi* to institute this claim and as such, this court should proceed to consider and determine the substantive issues and the orders sought.

The Procedure for Judicial Review

[74] The history and basis of entitlements as it relates to judicial review is now settled law, and I am guided by the weight of decided cases that the role of the court undertaking the exercise of a judicial review has been summarized as pertaining to the determination of whether a decision made by an authority can be impunged. The court can only do so in limited circumstances. This means the court may only intervene in circumstances where, for example, the decision maker has gone beyond their legal powers, the decision maker has not considered matters that lawfully must be considered, the decision maker has considered matters that are not relevant, or the decision was so unreasonable that no reasonable person in his same position could have made it. This approach was commended in the decision of ***Council of Civil Service Unions v Minister for the Civil Service*** [1984] 3 All ER 935. At pages 953-954 Roskill LJ in his judgment expounded the following:

> *"…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] 1 KB 223). The third is where it has acted contrary to what are often called principles of natural justice."*

[75] The foregoing approach was formulated, because the Legislator wants the decision maker to make the decision, not the court. We are exhorted by Lord Green M.R in the celebrated House of Lords decision of **Associated Provisional Picture Limited v Wednesbury Corporation** [1948] 1 K.B 223 at page 228, that:

> *"The courts must always, I think remember this: first we are dealing with not a judicial act, but an executive act; secondly, the conditions which, under the exercise of that executive act, may be imposed are in terms, so far as language goes, put within the discretion of the local authority without limitation. Thirdly, the statute provides no appeal from the decision of the local authority…"*

[76] The claimants do not dispute that the defendants are indeed the relevant and appropriate authorities that are by law seized with the jurisdiction to make orders regarding permits and licences in their respective spheres of operation. What is

disputed concerns the proper method of achieving that result, and whether the authorities have acted reasonably and according to law, within their capacity.

[77] In considering this claim for judicial review the court must, therefore, make a determination as to whether there is evidence to support the claimants' averments that the KSAMC, NEPA and NRCA acted in error of law, acted unreasonably or acted contrary to the principles of natural justice, when they respectively granted the development/building permission and environmental permit and licences to WAMH. The approach to be taken by the court will, therefore, concern a thorough examination of the sequence of events and the factual circumstances of this case. This court will also be determining the meaning and scope of the material provisions of the ***TCPA***, the ***NRCAA*** and any other relevant statutory provisions, orders and regulations.

The Principle of "Unreasonableness"

[78] Challenging the decision of an administrative authority because the decision was *"so absurd that no sensible person could ever dream that it lay within the powers of the authority"* has become known as **Wednesbury** unreasonableness, as was laid down by the House of Lords decision, **Associated Provisional Picture Houses Limited v Wednesbury Corporation.** In that classic decision, the issue that the court had to decide, was whether a local authority, which was empowered by statute to grant licences for cinematograph performances, had acted ultra vires its enabling statute or unreasonably; in imposing a condition that children under 15 years of age should not be admitted to Sunday performances, with or without an accompanying adult.

[79] The statute under consideration, provided no right of appeal from the decision of the local authority. Lord Greene MR, who delivered the leading judgment, considered the exercise of the local authority's discretion, it being a body entrusted by Parliament with the decision-making power. The decision of local authority, he determined, could only be challenged in the courts in a strictly limited class of case.

The House of Lords decided that the local authority had not acted *ultra vires* or unreasonably in imposing the condition which it did. The Authority they opined had properly taken into consideration the moral and physical health of children, which was a matter of public interest, and the court was not entitled to set up its own view of the public interest against the view of the authority.

[80] Lord Greene MR at page 229 of the judgment expounded the meaning of reasonableness and opined that:

> *"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 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 LJ in Short v Poole Corporation [1926] Ch. 66, 90, 91 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."*

[81] Lord Greene MR continued to outline instances in which the court can intervene to usurp the decision of a public administrative body as being unreasonable. He enunciated at page 233 of the judgment that:

> *"…The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them…"*

The Principle of "Irrationality"

[82] Historically, the unreasonableness ground of review was reserved for decisions whose outcome was manifestly bizzare or absurd, so unreasonable that no reasonable person could have made the decision. The bar to establishing unreasonableness may not necessarily be as high as in **Wednesbury**. Accordingly, the review court must ensure that any administrative decision is reasonable and authorised by the parameters of the statute under which it is made.

[83] Secondly, the review court must consider that there is now an offshoot ground of review for serious illogicality or irrationality. The court can enquire whether each decision made by the decision maker has an evident and intelligible justification. In other words, it may not be enough to arrive at a reasonable decision. The decision-maker should reason clearly from facts to conclusions and avoid any procedural missteps.

[84] De Smith, Woolf and Jowell, opined in their text ***Judicial Review of Administrative Action***, 5th edition, page 294, these "grounds" of review, i.e. illegality, irrationality and procedural impropriety are not exhaustive and they may overlap. In discussing " Rationality: logic, evidence and reasoning" the learned authors state at page 559, and 561:

> *"Although the terms irrationality and unreasonableness are these days often used interchangeably, irrationality is only one facet of unreasonableness. A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification. Instances of irrational decisions include those made in an arbitrary fashion, perhaps "by spinning a coin or consulting an astrologer". "Absurd" or "perverse" decisions may be presumed to have been decided in that fashion, as may decisions where the given reasons are simply unintelligible. Less extreme examples of the irrational decision include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decision, or where there is absence of evidence in support of the decision… Irrationality may sometimes be inferred from the absence of reasons…."*
>
> *… courts in judicial review will not normally interfere with an administrator's assessment of fact. In two situations, however, they may do so: first, where the existence of a set of facts is a condition precedent to the exercise of a power, and second, when the decision-maker has taken into account as a fact something*

> *which is wrong or where he has misunderstood the facts upon which the decision depends. Similarly, if there is "no evidence" for a finding upon which a decision depends, or where the evidence, taken as a whole, is not reasonably capable of supporting a finding of fact, the decision may be impugned. Again, these decisions are surely best described as strictly "irrational".”*

[85] In the decided case of ***Kristi Charles v. Maria Jones and The Minister of Education*** *(unreported), Supreme Court, Jamaica* ,Claim No. 2007 HCV0351, delivered 25 April 2008, Sykes, J (as he then was) had opined at para. 55 that one of the notable things about the passage cited above is that Lord Woolf perceives the possibility that a decision maker may not be perverse or unreasonable in the **Wednesbury** sense, but may still be subject to challenge by way of judicial review if the material before him does not support the decision he has made. I adopt this statement of the law.

The Principle of “Illegality”

[86] In the case of **Council of Civil Service Unions and Others v Minister for the Civil Services** [1985] AC 374, Lord Diplock at page 410 stated:

> *“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.”*

[87] Illegality as a sub-set in the context of Judicial Review proceedings takes into account the following:

a. whether the defendant considered irrelevant factors in coming to its decision,
b. whether the defendant failed to consider relevant factors in coming to its decision, and
c. whether the defendant acted in bad faith and used its powers for an illicit purpose.

[88] The authors De Smith, Woolf and Jowell, in chapter 6 of their text, discussed the ground of Illegality in a fulsome manne. At page 295, in particular, they have indicated that:

> *"The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the power in order to determine whether the decision falls within its "four corners" . In so doing the courts enforce the rule of law, requiring administrative bodies to act within the bounds of the powers they have been given. They also act as guardians of Parliament's will - seeking to ensure that the exercise of power is what Parliament intended.*
>
> *At first sight the application of this ground of review seems a fairly straightforward exercise of statutory interpretation, for which courts are well suited. Yet there are a number of issues that arise in public law that make the courts' task more complex. The principal difficulty is the fact that power is often conferred, and necessarily so in a complex modern society, in terms which appear to afford the decision-maker a broad degree of discretion. Statutes abound with expressions such as "the minister may"; conditions may be imposed as the authority "thinks fit"; action may be taken "if the Secretary of State believes". These formulae, and others like them, appear on their face to grant the decision-maker infinite power, or at least the power to choose from a wide range of alternatives, free of judicial interference. Yet the courts insist that such seemingly unconstrained power is confined by the purpose for which the statute conferred the power…"*

Ground 1

The building approval granted by the 1st defendant was done in breach of the Natural Resources Conservation Authority Act and the Town and Country Planning Authority Act which require an environmental permit to be issued prior to consideration by the 1st Defendant.

[89] The claimants do not dispute that, building permissions and or approvals, as it relates to the Corporate Area, are within the remit of the KSAMC. Indeed section 11 of the ***TCPA***, clearly designates the KSAMC to be the lawful authority to make such determinations. The disputed issue raised by the claimants is the narrow point as to whether KSAMC acted within the scope of its remit when it granted the building permit to WAMH.

[90] The KSAMC has denied that it had breached the provisions of any statute when it granted WAMH planning/building permission to undertake construction at the

disputed premises. The KSAMC has sought to refute the claimants' allegations of illegality and has contended that the statutory regime under which it operates is directory only and not mandatory. The KSAMC's position is that the scheme of the ***TCPA*** is concerned with "orderly development" and once there is "substantial compliance, the statutory mandate for orderly development" would be achieved and there "is effectively no breach" of the statute which would invalidate the decision made by KSAMC.

[91] The claimants are also complaining that the KSAMC was not thorough in how it handled the grant of the planning permit and its failure to refer the application to the Town and Country Planning Authority/NRCA. It is, therefore, important for this court to determine whether the KSAMC had any obligation to refer the application to the Town and Country Planning Authority for its particular consideration. I must also consider whether or not KSAMC was under a duty to ensure that WAMH's application was referred or sent to the NRCA for the environmental permit to be dealt with firstly before the planning/building permit was granted. Both the KSAMC and WAMH have sought to deny any obligation or culpability on their part regarding these issues.

[92] When the arguments of the KSAMC are examined closely, it is pellucid that it appreciated that WAMH was obliged to apply for a new environmental permit under the ***NRCAA***. In its defence, however, the KSAMC has taken the view that although the ***TCPA*** makes provisions that regard must be had to the ***NRCAA***, this consideration is merely directory. By extension the KSAMC's only reservation in relation to this issue, is the timing of the application and whether the timing invalidates the permit subsequently issued by NEPA and by extension the building permit it granted to WAMH.

[93] WAMH has also adopted the submissions of the KSAMC that the word "shall" as used in the context of section 11 (1A) of the ***TCPA*** is not mandatory and any failure to comply has not invalidated the permit issued by the KSAMC.

[94] The submissions made by the KSAMC and WAMH have raised a number of issues, including statutory interpretation. The KSAMC has also made submissions touching and concerning the actions of the NEPA and the NRCA, and also that of WAMH. In the circumstances, it is rather difficult if not impossible to separate the factual and legal analysis involving the different parties. There is, moreover, a certain amount of overlap between the issues relating to irrationality, and issues relating to illegality. I will accordingly, be grouping issues where convenient to do so and I will have to deal with the separate complaints made by the claimants against individual defendants otherwise.

Statutory Interpretation and use of the word "shall"

[95] In analysing the issue of illegality, a necessary starting point is to determine whether the legislature intended for the word "shall" as utilized in section 11 (1A) of the ***TCPA*** to be mandatory or directory. The definition of "shall" as set out in ***Black's Law Dictionary***, revised 4th Edition is as follows:

> *"As used in statutes, contracts or the like, this word is generally imperative or mandatory… But it may be construed as merely permissive or directory, (as equivalent to "may") to carry out the legislative intention and in cases where no right or benefit to any one depends on it being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense".*

[96] The learned authors De Smith, Woolf and Jowell in the text ***Judicial Action of Judicial Review,*** 5th edition at page 266 opined that:

> *"When Parliament prescribes the manner or form in which a duty is to be performed or a power exercise, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts have therefore formulated their own criteria for determining whether the prescriptions are to be regarded as mandatory, in which disobedience will normally render invalid what has been done, or as directory, in which case disobedience may be treated as an irregularity not affecting the validity of what has been done - Coney v Choyce [1975] 1 WLR 222)"*

[97] The learned authors further expounded at page 267 that:

> *" In order to decide whether a presumption that a provision is mandatory is in fact rebutted, the whole scope and purpose of the enactment must be considered, and*

> *one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act. It is necessary to assess the importance of the provision, particular regard being given to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision, and the importance of the procedural requirement in the overall administrative scheme established by the statute. Breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced. But the requirement will be treated as "fundamental" and "of central importance" if members of the public might suffer from its breach. Another factor influencing the categorisation is whether there will be another opportunity to rectify the situation; of putting right the failure to observe the requirement".*

[98] In determining how a court is to interpret words used in a statute I found the following decisions to be useful and instructive. Firstly, the admonition of Lord Campbell sitting as Lord Chancellor at page 718 in the decided case of ***Liverpool Borough Bank v Turner*** (1860) 45 ER 715, where he stated that:

> *"No universal rule can be laid down for the construction of statutes, as to whether enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of the Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."*

[99] Secondly, the decided case of ***Howard and Others v Bodington*** (1877) 2 P.D 203 at page 211 where Lord Penzance opined that the intent and purpose of the statute must be considered in determining whether words use are imperative or only directory:

> *"I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."*

[100] In ***London & Clydeside Estates Ltd v Aberdeen District Council*** [1979] 3 All ER 876 at 883; Lord Hailsham of St Marylebone LC extrapolated a different legal analysis as follows:

> *"When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like 'mandatory', 'directory', 'void', 'voidable', 'nullity' and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non-compliance with a requirement which I have held to be mandatory. Nevertheless, I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind."*

[101] In **Wang v Commissioner of Inland Revenue** [1995] 1 All ER 367, an appeal from Hong Kong, the Privy Council followed and applied the dictum of Lord Hailsham in the **London & Clydeside Estates case**. At first instance (see [1992] 1 HKLR 227) the judge found that the deputy commissioner lacked jurisdiction to make two determinations since he had not done so within a reasonable time required by the imperative language of the statute. The Court of Appeal reversed the decision (see [1993] 1 HKLR 7). On appeal, the Privy Council dismissed the appeal on two grounds. First, the Privy Council found on the facts that the determinations were made within a reasonable time. Secondly, on the assumption that there had been a breach of the time limit, the Privy Council held that the deputy commissioner had not

been deprived of his jurisdiction. After reviewing earlier case law, Lord Slynn of Hadley, giving the judgment of the court observed:

> *"Their Lordships consider that when a question like the present one arises—an alleged failure to comply with a time provision—it is simpler and better to avoid these two words "mandatory" and "directory" and to ask two questions. The first is whether the legislature intended the person making the determination to comply with the time provision, whether a fixed time or a reasonable time. Secondly, if so, did the legislature intend that a failure to comply with such a time provision would deprive the decision-maker of jurisdiction and render any decision which he purported to make null and void?"*

[102] It is safe to say that based on the foregoing authorities, that the word **'shall'** does not always connote an imperative but may also be directive. In the earlier line of decisions, the view was taken that if, on the proper interpretation of the statute, a requirement was mandatory, the failure to comply would invalidate what followed. If the requirement was directory, the failure to comply would not necessarily have an invalidating effect. There has been some development in this area of law, and based on the later decisions there is a clear shift from the perspective of just determining whether the 'disregarded' section of the statute is mandatory or directory. It is now the accepted approach that the court is to consider Parliament's intention and whether the consequences of non-compliance would be to invalidate the decision made.

[103] I will start my analysis with the rule as outlined in the case of ***London and Clydeside Estates Limited v Aberdeen District Council and Other***. The court in that case was asked to consider whether Parliament intended the outcome to be total invalidation if the particular provision of the statute was disregarded or misinterpreted by the decision maker. In essence one must consider objectively what intention should be imputed to Parliament. In determining the question of purpose, regard must be had to the language of the relevant provision and the scope and object of the whole statute, (***Tasker and Others v Fullwood and Others*** [1978] 1 NSWLR 20 at 24). I will now go on to consider these points.

The scope of the TCPA

[104] The scope and purpose of the ***TCPA,*** as an enactment is to ensure the orderly and progressive development of land, cities, town and other areas whether urban or rural to preserve and improve the amenities in Jamaica.

Language of the relevant provision

[105] Words do not always mean what they appear to mean, as the Connecticut Supreme Court observed in ***Raffaela Tramontano et al v Biagio Dilieto*** 472 A 2d 768 (Conn. 1984) "[t]he use of the word "shall," though significant, does not invariably create a mandatory duty because statutes must be construed as a whole to ascertain legislative intention". Sometimes however, it does. So the question remains, when does the word "shall," mean "shall," and when does it not? There are different factors to consider, it is of course difficult to lay down a general rule to determine in all cases when the provisions of a statute are merely directory and when mandatory or imperative, but, of all the rules mentioned, in the authorities cited, the test most satisfactory and conclusive is, whether the prescribed mode of action is of the essence of the thing to be accomplished, or in other words whether it relates to matters of substance or merely of convenience.

[106] It has been said that provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory, unless there is reason to believe that the legislature intended that the duty not be performed at all except within the time prescribed or that the time restriction should be considered a limitation upon the power of the tardy authority.

[107] Another way of expressing the general rule can be found in ***Winslow v. Zoning Board of Stamford,*** 143 Conn. 381, 387-88 (1956), (citing ***International Brotherhood v. Shapiro*****,** 138 Conn. 57, 67; ***Nielson v. Board of Appeals on Zoning***, 129 Conn. 285, 287; 50 Am. Jur. 51, § 29) "[l]egislative provisions designed to secure order, system and dispatch in proceedings are ordinarily held to be

directory where, as here, they are stated in affirmative terms or, to express it differently, are unaccompanied by negative words."

[108] Section 11 of the ***TCPA*** provides that:

> *"11(1) Subject to the provisions of this section and section 12, where application is made to a local planning local 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.*
>
> *(1A) Where the provisions of section 9 of the Natural Resources Conservation Authority Act apply in respect of a development which is subject of an application under subsection (1), planning permission shall not be granted unless-*
>
> *(a) an application to the Natural Resources Conservation Authority has been made as required by such provisions as aforesaid; and*
>
> *(b) that Authority has granted or has signified in writing its intention to grant, a permit under that Act"*

[109] Notably, the legislature saw fit to separate section 11 of the ***TCPA*** into two (2) paragraphs and treated with them in varying degrees. Thus paragraph (1) is a discrete provision which gives jurisdiction to the planning authority to grant planning permission in general circumstances. These general circumstances are different from that which obtains in paragraph (1A) of the said ***TCPA***. Paragraph (1) gives a discretionary power to the Authority and this statutory intention is gleaned from the use of words and phrases such as "may" and "as they see fit", relative to the grant of permission to "develop land". It is also clear from the overall scope of the Act that it is the intention of parliament that *"the provisions of the development order so far as material thereto.. and any other material considerations"* must be within the contemplation of the Authority before it grants or issues any planning permission.

[110] As it relates to paragraph (1A) the language is different, it becomes commanding. The language taken at face value, suggests that developers in the prescribed areas need to obtain a permit from the NRCA before planning permission can be granted in those instances. I have also noted that, the word *"shall"* does not stand on its own but is accompanied by a negative word, namely *"not"*, so that the full phrase is *"shall*

not". The further use of the word "*unless*" in the same paragraph reinforces my interpretation that the Authority can only proceed to grant permission if the stated criteria are first fulfilled. In my view, the use of the word "*shall*" in this context, connotes that the Authority is not being allowed to exercise a discretion where a development application involves section 9 of the ***NRCAA***.

[111] This court agrees that the general purpose of the ***TCPA*** is to ensure that developmemts are undertaken in an orderly manner, hence the requirement for development/building permits. Nevertheless, there are other material considerations that are important if not more important. It is to be borne in mind that as a part of its remit the NRCA must ensure that Jamaica's natural resources and its physical environment are conserved and protected. The ultimate consideration, therefore, is protection of the environment as mandated in section 9(5) of the ***NRCAA.*** Would be developers such as WAMH must not, therefore, be allowed to ride roughshod over the provisions of both statutes, neither should an Authority seek to thwart the law in the name of "good administration" or merely for the sake of expediency.

[112] I have also considered the evidence of Mr. Peter Knight, CEO of NEPA who has deponed that the "KSAMC has sole responsibility for issuing building permission. Further, the KSAMC amended the building and planning permission without reference to NEPA". The witness in so saying, clearly demonstrated his appreciation that the decision as taken to grant WAMH a building permit, was within the remit of the KSAMC, but nonetheless, it had an obligation to consult with NEPA before it granted said permit in December 2017.

[113] NEPA has the responsibility to carry out the technical and administrative mandate of three statutory bodies, namely the NRCA, the Town and Country Planning Authority and the LDUC). Accordingly NEPA's mandate is to promote sustainable development by ensuring protection of the environment and orderly development in Jamaica. To ensure that *"Jamaica's natural resources are being used in a sustainable way and that there is broad understanding of environment, planning and development issues, with extensive participation amongst citizens and a high level*

of compliance to relevant legislation". In accordance with their legislative mandate, NEPA operates under not only the ***Natural Resources Conservation Authority Act****;* but also the ***TCPA*** and **the *Land Development and Utilization Act.***

[114] Whilst KSAMC may have a discretion to grant building approval retrospectively, the environmental permit is essential to KSAMC as a *"material"* consideration of the building permit granted to WAMH. The fact that KSAMC might have undertaken their own environmental studies, does not obviate the need for the environmental permit from NEPA. KSAMC is not authorized to substitute their own environmental studies for the required environmental permit from NEPA. There is good reason why the Legislature saw fit to vest a separate authority with responsibility for undertaking the appropriate enquiries and analysis and vest them with the authority to grant or deny environmental permits and licences. In so doing the actions of these two authorities can operate as a check and balance to prevent abuse of power by any one authority.

[115] In light of the assistance provided in the foregoing decided cases and my appreciation of them, this court is inclined to rule that the use of the word *"shall"* in section 11(1A) of the ***TCPA***, is mandatory, as the Act in this section is clearly outlining a procedure that is to be followed by the planning authority where section 9 of the ***NRCAA*** applies. The imperative is that the authority **"shall not"** issue any planning permission before an enviornmemental permit is obtained from the NRCA or before receiving such an intention in writing.

[116] Undoubtedly, in this instance the application for planning permission made to the KSAMC is one which concerned section 9 of the ***NRCAA***. The ***TCPA*** sets out two distinct procedures for obtaining planning permission. As far as this court is concerned the grant of an environmental permit prior to obtaining a planning or building permit pursuant to section 11(1A) of the ***TCPA*** relates to a matter of substance and not merely convenience.

Ground 2

The building approval granted by the 1st Defendant and the Enviornmental Permit issued by the 2nd and/ or 3rd Defendants are illegal as the proposed development is in breach of the Town and Country Planning (Kingston) Development Order, 1966 and the Town and Country Planning (Kingston and Saint Andrew and Pedro Cays) Provisional Development Order, 2017.

[117] The claimants allege that the defendants failed to give due consideration to the ***1966 Development Order*** and the ***2017 Provisional Development Order*** and accordingly the building permit granted by the KSAMC and the environmental permit granted by the NEPA and the NRCA are illegal.

[118] It is noteworthy to mention at this juncture that the claimants did not identify any breaches under the ***1966 Development Order*** in their pleadings. I will, therefore, only address the alleged breaches of the ***2017 Provisional Development Order***, as set out by the claimants. These are:

> *"1. Policy BH1 only allows multi-family development on parcels of land which are at least ½ an acre, whereas the relevant premises is only 0.38 of an acre and therefore clearly does not meet the criteria.*
>
> *2. Policy BH2 sets the maximum density at 50 habitable rooms per acre, whilst the development is at minimum 26 habitable rooms on 0.38 acres, which translates as 68 habitable rooms per acre; and therefore would clearly exceed the limit.*
>
> *3. Policy SP H30 prescribes that where the area of a studio is exceeded (i.e 400 square feet or 46.5 square metres) the planning application will be assessed as a one, two, three-bedroom unit (as the case may be) for each additional 100 square feet, with the application of the relevant statutory requirement. As each unit is approximately 1, 200 square feet or 109 square metres, then had this policy been applied, each unit ought to have been assessed as a three-bedroom unit for density purposes rather than as one-bedroom room units."*

[119] The KSAMC has conceded that where applications are made to it pursuant to section 11 (1) of the ***TCPA***, the local planning authority "shall have regard to the provisions of the development order so far as material thereto…" The KSAMC nonetheless, contends that this is a discretionary power to be exercised by the Local Planning Authority, and does not require mandatory compliance. "Moreover, as it

relates to “other considerations”, no specific mandatory criteria are listed”. The 1st Defendant submitted that it enjoys some flexibility as to what it will deem material considerations based on the dynamics of any given scenario.

[120] The KSAMC has indicated through the evidence of Mr. Shawn Martin what it deemed, in this particular circumstances, to be material considerations.

> *“…applications for planning permission are assessed in accordance with the provisions of the Town and Country Planning Act, the Town and Country Planning (Kingston) Development Order, 1966 (“the Development Order”), the Town and Country Planning (Kingston and Saint Andrew and the Pedro Cays) Provisional Development order, 2017)(“Provisional Development Order, 2017”) and the Manual for Investment & Development and best practices developed by the 1st Defendant. The Provisional Development Order is still under review.*
>
> *…in addition to the provisions of the Development Order, some material conditions which I took into account in assessing WAMH’s application include:*
>
> *a. The provisions of the Provisional Development Order, 2017;*
>
> *b.That there was an existing environment permit and building and planning approval for the construction of twelve studios on a two storey building on the said property;*
>
> *c. That there are other three and four storey multifamily buildings in the immediate and general environs of the development; that there are other multifamily developments on Birdsucker Drive, specifically 2-6 Birdsucker drive, 8 Birdsucker Drive, 19 Birdsucker Drive and 28 Birdsucker Drive as well along Graham Heights;*
>
> *d. That there was adequate infrastructure and utility service in place;*
>
> *e. The plan for the development has 20 parking spaces which is more than the 1.25 spaces per unit required for parking;*
>
> *f. That the amenity space on the plan for the development includes play area, cabana, pool deck and roof deck which exceed the 30 square per unit required;*
>
> *g. That the provision for sewage disposal also exceeded the requirements for the twelve (12) units disposal with septic tank and reed bed soak-a-way into an absorption pit;*
>
> *h. That the boundary setbacks are acceptable;*
>
> *i. That given the building design, the plot area ratio is adequate; and*
>
> *j. That conditions would be imposed including in requiring rain water harvesting so that there would be adequate supply of potable water for units in the development”.*

[121] The KSAMC had forcefully submitted that the ***1966 Development Order*** is silent as to the number of habitable rooms per acre which are to be allowed in developments such as in the present case, and that the ***2017 Provisional Development Order*** is to be used only as a guide as it is not in effect and does not have full legal force and as such what it contains are only guidelines and policies which should guide development.

[122] Interestingly, although the KSAMC had taken the above half-hearted approach, it has nonetheless relied on the evidence of Mr. Shawn Martin, a planning officer within its employ. Mr. Martin had indicated that he had assessed WAMH's application and had given consideration to the guidelines and policies for development and the provisions of the relevant development "Order" (singular). Although Mr. Martin did not specify which Order he contemplated, he however said that contrary to the assertions of the 1st claimant, Mr. Michael Young, the guidelines and policies for development in the area where the premises is located provided for a density of 50 habitable rooms per acre. As far as this court is aware the only Order which speaks to such matters is the ***2017 Provisional Development Order***. I, therefore, understand Mr. Martin to be saying that the ***2017 Provisional Development Order*** guided his assessment and recommendations.

[123] This clearly demonstrates that the KSMAC holds itself bound, to contemplate these guidelines and ought not to be allowed to resile from that position. KSAMC cannot pick and choose to only adhere to those guidelines that are favourable to their purposes and which can be utilized to justify the decision they have made; whilst choosing to disregard other guidelines which are inconsistent with that decision and which calls into question the reasonabless of its decision. NEPA and the NRCA understandably made no submissions on this point and through the evidence of their witnesses, indicate that they had in fact considered these provisions. In the circumstances I find that the ***2017 Provisional Development Order*** even if it was not in full force in 2017/2018, was still a material consideration.

[124] The evidence of Mr. Shawn Martin stated that he took the ***Provisional Development Order*** into consideration when making his recommendations regarding WAMH's planning/building permit. This is an indication of his awareness that indeed they were a material consideration. I note, however, that there is no recorded evidence that Mr. Martin had in fact done so as this was never indicated on the application for amendment or any other written documentation. I would think that for the sake of transparency, a public servant who is exercising a statutory duty would reveal his thought process at all material times, and more specifically, reveal the link between the facts and his conclusions. This begs the question whether Mr. Martin's belated assertions should be believed by the court, especially as the KSAMC is seeking to deny the validity and efficacy of the ***2017 Provisonal Development Order***.

[125] Did Mr. Martin consider the lot size of number 17 Birdsucker Drive, subject to the scope of the proposed development, specifically the number of the proposed habitable rooms (as per policy BH1)? He has not demonstrated that he did so. Alternatively, he failed to appreciate that granting the building permit would lead to over development of the lot, as on the admission of NEPA and the NRCA this allowance was in fact exceeded by some 5 rooms. Nowhere in his evidence, has Mr. Martin demonstrated how he resolved this issue. In these circumstnces I am led to the view that KSAMC did not take all relevant factors into consideration, and neither did it demonstrate what weight was accorded to overdevelopment which was a relevant factor for consideration. The decision to grant WAMH the building permit is, therefore, unreasonable.

[126] I am fortified in my finding based on the opinion of the learned authors De Smith, Woolf and Jowell in ***Judicial Review of Administrative Action*** 5th edition at page 557 :

> *" When the courts review a decision they are careful not readily to interfere with the balancing of considerations which are relevant to the power that is exercised by an authority. The balancing and weighing of relevant considerations is primarily a matter for the public authority and not for the courts. Courts, have, however, been*

willing to strike down as unreasonable decisions where manifestly excessive or rnanifestly inadequate weight has been accorded to a relevant consideration".

Did NRCA/NEPA take all relevant factors into account?

[127] I will now address my mind to the issue as to whether material factors were taken into consideration by NRCA/NEPA in granting the belated environmental permit. Relative to this issue, I have had regard to the affidavit evidence of Mr. Leonard Francis, Town Planner and Director of the Spatial Planning Division employed to NEPA as also the affidavit of Mr. Gregory Bennett, Urban and Regional Planner employed to NEPA.

[128] The evidence of Mr. Leonard Francis indicated that the permit was in total conformity with the Development Plan. He said that the premises (17 Birdsucker Drive) was zoned in the ***Town and Country Planning (Kingston and St. Andrew and Pedro Keys) Provisional Development Order*** "for 125 habitable rooms per hectare (50 habitable rooms per acre)" and WAMH was in compliance with the Development Plan. To my mind for Mr. Francis to say that WAMH was in compliance and then another witness to say that there were breaches detected is a somewhat contradictory position taken by NEPA. In his evidence, Mr. Francis also said that the Draft Guidelines for Variations in Densities and Parking Standard for Development Applications allowed for variations of up to a maximum of 30% depending on the design, nature of the area, availability of infrastructure and other amenities. He stated also that WAMH's proposed development was 26% over the 125 habitable rooms per hectare (50 habitable rooms per acre).

[129] Although Mr. Francis has sought to assure the court that WAMH was within the 30% allowable variation, he did not demonstrate how he calculated and arrived at the twenty-six percent (26%) excess attributed to WAMH's proposed development. The court was, therefore, not enabled to do its own calculations and to verify the accuracy of Mr. Francis' evidence on this point. The claimants have pointed out, and Mr. Francis had acknowledged, that indeed at least one NRCA Board Member, Ms. Wallock, had expressed concerns that the density in WAMH's proposed plan had

been exceed by at least 5 habitable rooms. Mr. Francis said this variation in density is not unusual and was in fact contemplated "during the preparation of the Development Order and the Variation Document".

[130] I note that Ms. Wallock's concern was met with the following utterance; *" … the application before the authority was for an environmental permit. There would be no reason not to consider the matter because the planning component was already approved by KSAMC"*. Does this mean that because KSAMC had already given planning permission then, therefore, the environmental permit was a mere formality? Did the Board give any independent consideration to this issue of possible overdevelopment of the premises relative to the lot size and any negative consequences this might have had on the environment? Were the actions of NEPA and the NRCA mere rubber stamping of WAMH's application? I will have to carefully contemplate and answer these further questions, because depending on my findings the NRCA's decision could well be regarded as perverse and consequently, irrational.

[131] In ***R v. Lord Saville of Newdigate and others, Ex parte A and Others*** [2000] 1 WLR 1855, a decision of the English Court of Appeal, Lord Woolf in his judgment makes the important point that the justification which will be necessary to avoid a decision by a public authority being considered by the courts to be irrational, will depend upon the possible consequences of the decision. The learned judge discussed the ***Wednesbury*** principle reiterating that it is the court and not the body being reviewed who has the final responsibility of deciding whether a decision is unlawful. Therefore, the courts can and do intervene when unlawfulness is established. The learned judge then went on to indicate at paragraph 33 of the judgment, that:

> *" … there are some decisions which are legally flawed where no defect of this nature can be identified. Then an applicant for judicial review requires the courts to look at the material upon which the decision has been reached and to say that the decision could not be arrived at lawfully on that material. In such cases it is said the decision is irrational or perverse. But this description does not do justice to the decision-maker who can be the most rational of persons. In many of these cases, the true explanation for the decision being flawed is that although this*

> *cannot be established the decision-making body has in fact misdirected itself in law. What justification is needed to avoid a decision being categorised as irrational by the courts differs depending on what can be the consequences of the decision…"*

[132] On the strength of Mr. Francis' affidavit the NEPA amd NRCA posited that this "variation in density is not unusual and was contemplated during the preparation of the Development Order and the Variation Document". Therefore, the NRCA "assessed" WAMH's development proposal taking account of the Order and aver that they "properly approved the environmental permit" that NEPA issued. Counsel on behalf of NEPA and the NRCA relied on the NRCA's minutes exhibited to the 3rd Affidavit of Michael Young as also that of Gregory Bennett, an Urban and Regional planner employed to NEPA and Director, Applications Management Division.

[133] Mr. Bennett in his affidavit evidence spoke about the receipt of WAMH's environmental permit and licences applications on 2nd May 2018. He asserted that the said applications *"were processed for review and circulated to the relevant agencies for review and comments".* Mr. Bennet was well aware that the KSAMC had by then already granted building and planning permission to WAMH. He has in his evidence noted, that building and planning permission was granted to WAMH Development Limited by letter dated December 19, 2017 which was received by the NRCA on May 2, 2018. In particular, Mr. Bennett's evidence outlines that an environmental licence was granted to construct a waste water treatment plant and discharge treated effluent that was previously submitted. Mr. Bennett further testified that in relation to the environmental permit, consideration was given to the density setbacks, amenities, landscaping, plot area ratio access and drainage as prescribed in the ***1966 Development Order*** and the ***2017 Provisional Development Order***.

[134] It is the evidence of Mr Gregory Bennett, that the technical review that was undertaken, identified that the planning parameters of parking, amenity area, landscaping, height, drainage, access, sewerage treatment and disposal were satisfied. The proposed density, side setbacks and plot area ratio were only partially satisfied. He also stated: "On 11th May 2018, the applications were tabled at the Internal Review Committee Meeting where the findings of the technical review and

site inspection were presented and discussed. Following the discussions the following actions were instructed:

- *"Letter to be written to the complainant to refer to KSAMC and be informed of what was approved and the fact that the changes approved by the KSAMC were not referred to the Agency, etc.The letters should be copied to Minister, Mayor, Chairman (NRCA) and other relevant parties.*
- *Background of the applications is to be reviewed by Legal Services Branch of the Agency.*
- *Cessation order to be signed and issued.*
- *The application should be reffered to the Natural Resources conservation Authority for consideration. A submission should be prepared with all relevant details and circulated to the Board members".*

[135] Mr. Bennett gave further evidence that, WAMH's application was submitted to the NRCA with 3 options:

1) Refusal – because the density and plot area ratio had been exceeded. The setback to the right boundary had not been met. This, therefore, represented an over intensive development of the site. The proposal for a multi-family development in this area required a lot size of ½ acre based on policy outlined in the ***2017 Provisional Development Order***. Allowances would require the proposal to satisfy all planning standards which this proposal has not done.
2) Recommendation – that the applicant amends the proposal to meet the planning standards, namely: density, plot area ratio and setback.
3) Approval - subject to the conditions outlined above being implemented.

[136] The court notes that indeed on the 14th May 2018, NEPA served on WAMH a cessation order signed by Mr. Peter Knight, CEO, but soon thereafter, with unseemly haste, on the 15th May, 2018, the application for the environmental permit was considered and ultimately granted.

[137] Mr. Bennett asserted that option 3 was selected by the NRCA, and that its approval was granted subject to the specified conditions being implemented. If the narrations of Mr. Francis and Mr. Bennett are to be believed, then there is evidence in this case

which counters the allegations of the claimants that NEPA and the NRCA did not take the provisions of the relevant Ordinances into consideration. If this court accepts this evidence as truthful, then there is no scope for interference, as a court of review is not allowed to substitute its own views as to what options the Authority should have chosen.

[138] There is no evidence supplied to this court which contradicts the procedure allegedly undertaken by NEPA and the NRCA in coming to the decision to grant WAMH the environmental permit, and I, therefore, accept that they had in fact taken the relevant 1966 and 2017 Ordinances into account.

[139] I however, go further and by applying the principles of law laid down in A***nisminic Ltd v Foreign Compensation Commission*** [1969] 2 AC 147***,*** I question whether NEPA and the NRCA had in fact considered all relevant factors in coming to a decision and in granting the environmental permit to WAMH. Did they give due consideration to the timing of the application made by WAMH and whether they were authorized to grant permits retrospectively. I will, therefore, now address the issue of whether NRCA/NEPA's decision was illegal as alleged by the claimants.

[140] One of the heads of illegality as averred against NEPA and the NRCA is that, the environmental permit was granted after a planning permit was already issued by KSAMC and at a stage when WAMH's construction or development was already underway. In determining this issue I must scrutinize the statutory provision in question and as with section 11 of the ***TCPA,*** I must make a determination as to whether the use of the word "shall" under the ***NRCAA*** is mandatory or merely directory.

[141] For the sake of clarity and focus, it is here appropriate that I reproduce the relevant aspects of the legislation in dispute. Section 9 of the ***NRCAA*** provides that:

> *"9(1) The Minister may, on the recommendation of the Authority, by order published in the Gazette, prescribe the areas in Jamaica, and the description or category of enterprise, construction or development to which the provisions of this section shall apply; and the Authority shall cause any order so prescribed to be published once in a daily newspaper circulating in Jamaica.*

> *(2) Subject to the provisions of this section and section 31, no person shall undertake in a prescribed area any enterprise, construction or development of a prescribed description or category except under and in accordance with a permit issued by the Authority.*
>
> *(3) Any person who proposes to undertake in a prescribed area any enterprise, construction or development of a prescribed description or category shall, before commencing such enterprise, construction or development, apply in the prescribed form and manner to the Authority for a permit, and such application shall be accompanied by the prescribed fee and such information or documents as the Authority may require.*
>
> *(4) …*
>
> *(5) In considering an application made under subsection (3) the Authority-*
>
> *(a) shall consult with any agency or department of Government exercising functions in connection with the environment; and*
>
> *(b) shall have regard to all material considerations including the nature of the enterprise, construction or development and the effect which it will or is likely to have on the environment generally, and in particular on any natural resources in the area concerned, and the Authority shall not grant a permit if it is satisfied that any activity connected with the enterprise, construction or development to which the application relates is or is likely to be injurious to public health or to any natural resources…"*

[142] I have pinpointed that the evidence led in this case, supports that the premises located at 17 Birdsucker Drive, falls within the parameters of section 9 of the ***NRCAA*** and, therefore, any construction or development to be carried out at that location, are subjected to the conditions and restrictions as provided in that law. The law provides no bar to construction or development of the premises *per se*, rather there are restrictions as to how such enterprise can be carried out and more importantly such enterprise must be guided by permits and licences. An examination of subsection 3, makes it pellucid that the application for and the receipt of the permit and licences are conditions that must precede the commencement of any construction or building on any land such as the premises in question.

[143] There is no challenge mounted by the defendants that the environmental permit was obtained at a stage when construction was already underway at the disputed premises, in fact, it seems to me that construction was substantially advanced at that stage. The permit was obtained in consequence of NEPA issuing a site warning notice to WAMH. It was the issuance of that site warning notice in May 2018, which

prompted WAMH to make a belated application to NEPA seeking the required environmental permit.

[144] In a letter addressed to Mr. Peter Knight, CEO of NEPA, the Directors of WAMH indicated that; *"[w]e were unaware that we needed to seek another approval from NEPA seeing that the KSAC would have contacted NEPA at the point of granting us the approval for the amendment…".* Additionally, in an affidavit dated 28th November 2018, Mr. Wayne Marsh, one of WAMH's directors, again indicated that, *"we had honestly believed that the approval granted by NRCA to M&M was valid and transferrable to WAMH".*

[145] The approval which Mr. Marsh indicated in the correspondence to Mr. Knight, was an environmental permit issued on 18th February 2016, and not 2017 as he consistenly and erroneously stated in several documents/affidavits. I have examined that rermit granted to M&M and at paragraph 2 under caption "General Conditions" it is specified that the *"Permittee **shall not** assign, or transfer or dispense with this Permit or part with any benefit under it except with the prior written consent of the Authority*"(emphasis added). The Authority in question is undoubtedly the NRCA through its agent NEPA. In light of the various conditions indicated in the permit that was obtained by M&M in 2016, it seems to me that environmental permits are personal to the grantee, does not run with the land and would cease to be valid once there is a change of ownership of the land.

[146] I am, therefore, at a loss, as to how WAMH could have entertained any belief, honest or otherwise that they were entitled to the use of the 2016 permit issued to M&M by NEPA. It is interesting that WAMH made an application to KSAMC for a new building permit having realized that the scope of the intended construction at the premises had increased significantly, why is it that they did not also appreciate that the environmental factors had also changed significantly, and as a result, there was a need to seek a new environmental permit?

[147] Although WAMH has conceded that they had failed to make an application for an environmental permit, prior to obtaining building permission from KSAMC and prior to commencing construction, they nonetheless insist that the building permit granted to them is valid. This begs the question as to whether the building permit has any efficacy without the supporting environmental permit.

[148] WAMH has adopted and advanced the views of the KSAMC that because section 13 1(a) of the ***NRCAA*** states that where a person fails to comply with section 9 (2) the Authority under that statute, may issue a cessation order, and further, the fact that such a cessation order may be issued by NEPA contemplates a situation where a development has proceeded without an environmental permit" and allows the developer an opportunity to cure this failing.

[149] I quite agree with the foregoing submission, to the extent that the statute empowers NEPA to issue cessation orders, but what I do not agree with, is WAMH's further submission that the retrospective environmental permit can be validly issued by NEPA. To say that because section 13 enables NEPA to issue cessation orders means that applications can be validly made and permits granted after the fact, is a *non sequitur*. It is noticeable that nowhere in the legislation is there opportunity for an application to be made after the fact. It is my view that, if this was Parliament's intention, then it would have so provided in explicit and clear terms. It is by no means inconceivable, that Parliament did not intend that wrong doers and law breakers should benefit from their unlawful ventures and actions.

[150] The application made by WAMH in May 2018 was for an environmental permit to construct a "multi-family housing development consisting of twelve (12) one-bedroom apartment units on a single 4 storey block…"**.** A "Permit to Undertake Enterprise, Construction or Development in a Prescribed Area" pursuant to section 9 (2) of the ***NRCAA*** was accordingly issued by NEPA. The permit allowed WAMH to construct a "housing project of 10 – 25 houses at 17 Birdsucker Drive, Kingston 8". Licences were also granted to construct and operate a wastewater treatment plant (black water), pursuant to section 12(1) of the ***NRCAA*****.** WAMH was duly

notified of the issuance of the permit and licences by correspondence dated 29th May 2018; however, the effective date of the permit and licences is 7th June 2018.

[151] Having scrutinized the applicable legislation and regulations, I have concluded that, pursuant to Regulation 7 of the ***Natural Resources Conservation (Permits and Licences) Regulation*** (1996), a permit to undertake an enterprise, construction or development is not transferrable. WAMH, therefore, was not entitled to rely upon the environmental permit and licence issued by NEPA to M&M on 18th February 2016. Since it is an incontrovertible fact that when WAMH commenced construction at the premises in 2018 they did not possess the requisite environmental permit, what then is the effect of this failure? The fact that WAMH obtained an environmental permit retrospectively, as posited by the KSAMC, can this be taken to mean that WAMH would then be "in substantial compliance with the provisions of the ***NRCAA?***"

[152] NEPA and the NRCA are of the view, and correctly so, that WAMH had an obligation to apply for an environmental permit in its own right. It was the failure of WAMH to make such an application, which led to the site warning notice and cessation order issued by NEPA in May 2018. NEPA and the NRCA seemed to have adopted and endorsed the argument posited by the KSAMC that on receipt of the environmental permit WAMH would then have been in substantial compliance with the requirements of the ***NRCAA.***

[153] The claimants have stoutly disagreed with the position of the defendants and WAMH in relation to this issue. They have however, inter-twined their challenges of the decision made by NEPA and the NRCA with that made by the KSAMC and have contended that such decisions are in breach of both the ***NRCAA*** and the ***TCPA***. The basis of the alleged illegality, is however, grounded in the actions of the KSAMC, over which NEPA has averred it had no control. Nonetheless, It is my view that a proper review of the decision of all the defendants can be undertaken on the basis of illegality, but separate consideration must be given to the actions of each Authority, compared to their individual governing statutes.

[154] NEPA and the NRCA whose defence was ably advanced by counsel, Mrs. Reid-Jones, refutes the allegations of illegality. Counsel submitted that the evidence in the several affidavits of their witnesses illustrated that as far as NEPA and the NRCA are concerned, their actions were lawful and reasonable when they subsequently granted WAMH the environmental permit with appropriate conditions attached. The pivitol question is whether NRCA could lawfully grant such a permit retrospectively.

[155] Since NEPA is a creature of statute, it has no jurisdiction to do other than what it is permitted by its enabling statute. NEPA being the agent of the NRCA had the jurisdiction to issue the environmental permit and licences to WAMH, but in issuing the same, NEPA must adhere to the provisions of its own legislation. Looking at the provisions of the ***NRCAA*** at section 9(3), the wording of the provision taken at face value, clearly stipulated that an enviornmental permit is a condition which ought to precede the commencement of any construction process. NEPA is deemed to know the law governing its existence and its powers and would have been aware that up to April 2018, no course of action as stipulated under that law, had been undertaken by either WAMH or NEPA relative to the issuance of an environmental permit for the premises at 17 Birdsucker Drive.

[156] The KSAMC, through counsel, had argued that section 11(1A) of the ***TCPA*** and section 9 of the ***NRCAA*** when read together prescribed the procedure for obtaining planning permission for construction or development, which requires an application for a permit under the ***NRCAA***, and that the procedure outlined in the relevant sections is directory only and not mandatory. Accordingly, once there has been substantial compliance, the statutory mandate for orderly development has been met and there is effectively no breach invalidating the decision made after the fact.

[157] Counsel for NEPA and the NRCA had in part adopted the arguments of the KSAMC, particularly as it concerned the interpretation of the word “shall” as used in the context of the ***NRCAA,*** to the effect that the provision is merely directory as against being mandatory. I agree that indeed words can be interpreted differently depending on context and purpose of the legislation.

[158] The words used in section 9(2) and (3) of the ***NRCAA,*** clearly indicates the intention of Parliament as it pertains to permits and licences affecting development, building, construction *inter alia*, being conducted on prescribed land or premises. The framers of the legislation have clearly enunciated that *"Any person who proposes to undertake ... any enterprise, construction or development…* ***shall, before commencing*** *such enterprise, construction or development, apply … to the Authority for a permit…[emphasis added]".*

[159] Section 31 of the said statute buttresses this criteria, by reiterating the need for obtaining a permit pursuant to section 9 activities. The foregoing section indicates that the grant of a permit or licence pursuant to the ***NRCAA*** does not dispense with the necessity of obtaining planning permission when so required under the ***TCPA***, and encourages applicants to make concurrent applications to both Authorities. The imperative given in the section is not merely that permits ought to be obtained but must be obtained as a condition precedent. Hence the total directive is forcefully conveyed by the words "*shall before commencing*".

[160] Mr. Peter Knight's appreciation of this jurisdictional issued is evident from his letter dated 11th May 2018, in response to the 10th claimant, Mr. Gavin Goffe. Mr. Knight in his communication indicated that the "*decision of the KSAMC is contrary to the* ***Natural Resources Conservation Authority/Town and Country Planning Authority Acts*** *which requires an environmental permit prior to any consideration by the KSAMC. In light of the aforementioned, the Agency cannot accept liability for the present situation… since the decision was outside the perview of the NRCA/TCPA/NEPA".* Interestingly, counsel Mrs. Reid-Jones in making her submissions had notecably failed to address this damning assertion made by the witness from NEPA. Mr. Knight's statement is, therefore, inconsistent with the submissions made on behalf of NEPA and the NRCA on this point.

[161] The KSAMC had further submitted that no sanction is prescribed under the ***TCPA*** for failing to obtain an environmental permit prior to obtaining planning permission, and that the local Authority can issue building permits retrospectively. This counsel

Ms. Newby has submitted is indicative of section 11 being merely directory. To some extent, I agree that KSAMC has the power under the ***TCPA*** to retrospectively grant permits regarding development, building and construction permission, among other things. It is also true that no sanctions are provided under the ***TCPA*** for failure to obtain development/building permits prior to commencement of any building or construction.

[162] In stark contrast however, under the ***NRCAA***, the undertaking of a development, construction or other activity, without a permit is in fact proscribed and sanctioned. Specifically, section 9(7) contemplates criminal libiality and penalties of fines and or imprisonment, where any person contravenes the requirement for a permit under sub-section (2).

[163] It was also advanced by the KSAMC that the fact that "the NRCA has the authority to issue a cessation order as an enforcement measure for non-compliance with the requirements of section 9(2), which can compel developers to obtain a permit", this is indicative that the requirement in the ***TCPA*** to obtain an environmental permit prior to planning permission is directory rather than mandatory under section 13 of the ***NRCAA***.

[164] The fact that section 9 (7) of the ***NRCAA*** provides that enforcement measures can be instituted to ensure compliance, in my view, is separate and apart from the provisions in the ***TCPA*** and does not support the arguments of either the defendants nor WAMH, that the respective provisions in the ***TCPA*** or ***NRCAA*** are discretionary provisions.

[165] WAMH, whilst conceding that the ***NRCAA*** provides for the imposition of penalties where there is a flouting of the law, nonetheless has submitted that section 13 (1) (a) allows for an application for a permit after the fact. WAMH has further submitted in this regard, that sections 11(1) and 2(a) of the ***NRCAA*** has a similar provision to what obtains in section 22 of the ***TCPA***, where it is provided that, *"NEPA can revoke or suspend the permit and give notice in writing specifying the breach. So if the*

breach is that they did not give approval then they can rectify same". I have critically assessed the provision and even on a most generous and indulgent interpretation I cannot agree with this submission.

[166] Section 13(1)(a) of the ***NRCAA*** permits the Authority at its discretion to issue cease orders and this is without prejudice to the provisions of sections 9(7), 10(4) 11 and 12(3). It is to be noted that sections 9(7), 10(4) and 12(3) are provisions for fines and or imprisonment on conviction for failing to obtain permits and licences as required for the execution of certain activities. Section 11 speaks to the revocation and suspension of existing permits for breaches of any of its terms or conditions, so that, notices issued pursuant to section 11(2) are intended to inform the grantee of the breach of the conditions and or terms of a permit granted prior, requesting that the breach be remedied and affording them the opportunity to be heard prior to said permit being revoked. This, therefore, presupposes the existence of a permit.

[167] Section 13 further authorises the Minister to take steps to ensure compliance with a cessation order and to employ the use of force in obtaining compliance by the violator. Noticably under section 13 there is no concurrent jurisdiction given, discretionary or otherwise which permits NEPA to invite any person to make a belated application so as to remedy, cure or correct the contravention of section 9 (2).

[168] The fallacy in the arguments of the defendants, and WAMH in particular,r is underscored when one examines the provisions of section 11 of the ***NRCAA***, which speaks to the revocation and suspension of permits. The revocation must be by way of "notice addressed to the **person to whom a permit was issued**".(emphasis added). Additionally, the revocation must be in relation to breaches of "terms and conditions" of the permit. It is my view, therefore, that a notice under section 11(2) is to facilitate the remedying of breaches of existing permits and does not contemplate non-existent ones. Contrary to WAMH's submission that "… if they did not get the approval then they can rectify same", there can be no rectification of non-existent permits in such circumstances.

[169] In determining whether NEPA had in fact purported to exercise a power which in law it does not possess when it belatedly issued an environmental permit to WAMH in May of 2018; I have paid close scrutiny to its enabling statute. I am led to the conclusion that on a plain reading of the text, there is no jurisdiction within the parameters of the statute which allows retroactive issuance of environmental permits by the Authority or its agent NEPA.

[170] Therefore, it is my view that an error was committed by NEPA/NRCA, an error of law that goes to jurisdiction. NEPA in granting an environmental permit, post commencement of construction, acted in excess of its jurisdiction and did not consider competently and appropriately the application that was made by WAMH in 2018. It is my finding in those circumstances that the environmental permit issued to WAMH by NEPA in June 2018 is null and void.

Whether KSAMC had the authority to vary minimum standards as provided by the Ordinances

[171] The claimants have also averred that the KSAMC acted ultra vires as it lacked the statutory authority to exercise any discretion to vary the minimum standards specified in both the ***1966 Development Order*** or the ***2017 Provisional Development Order***, pursuant to section 12(1A) of the ***TCPA***. The claimants submited that all applications not in conformity with the relevant Development Order must be referred to the Town and Country Planning Authority. This assertion is predicated on the provisions of section 12(1A) of the TCPA. In determining this issue, I have read in detail the provisions of the ***TCPA*** section 12(1A) and this section provides that where the development is not in conformity it is for the Authority designated in that Act who is to consider this application for permission to build. Pursuant to Part I of the ***TCPA*** the "Authority" means the Town and Country Planning Authority appointed pursuant to section 3 of the Act.

[172] I will start with the provisions of section 12 as being the relevant law regarding this particular issue. Section 12(1) the Town and Country Planning Act provides as follows:

> *"The Authority may give directions to any local planning authority or, local planning authorities generally requiring that any application for permission to develop land, or all such application of any class specified in the directions, shall be referred to the Authority instead of being dealt with by the local panning authority, and any such application shall be so referred accordingly."*

Section 12(1A) provides that:

> *"Where an application to a local planning authority seeks permission for a development which is not in conformity with the development order, that application shall be deemed to be one required to be referred by the local planning authority to the Authority under this section."*

Section 12(2) provides that:

> *"Where an application for permission to develop land is referred to the authority under this section, the provisions of section 11 and of subsection (4) of section 13 shall apply, subject to any necessary modification, in relation to the determination of such an application by the Authority as they apply in relation to the determination by the local planning authority…"*

[173] As to whether or not this section grants a discretion to KSAMC, I found useful in making this determination a persuasive authority submitted by counsel for the Affected Party, namely the decided case of ***Simpson v Edinburg Corporation***. In that case a provision similar to the ***TCPA*** was in issue. In his judgment, Lord Guest at page 3 opined that:

> *"Section 12, … obliges the local authority in dealing with applications for planning permission to 'have regard to the provisions of the development plan so far as material thereto and to any material considerations."… "To have regard to" does not in my view mean, "slavishly to adhere to". It requires the planning authority to consider the development plan, but does not obliged them to follow it…"*

[174] It is clear from the evidence of Mr Gregory Bennett and Mr Leonard Francis `that as it concerned the proposed construction by WAMH at the premises, there were evident breaches of the ***2017 Provisional Development Order***, particularly as it related to densities and setbacks. At page 2 of the Draft Guidelines of the Variation in the Density and Parking Standards for Development Application, there are provisions which justify and allow for higher densities above the allowable densities.

The provisions also set out the criteria under which densities above the allowable density would be considered and the means by which a reduction in the parking may be adjusted. On page 5, the consideration for the *de minimis* waiver is set out, it states that *de minimis* waivers for housing developments normally adhere to the following guidelines:

> *" Increase in density could be viewed as appropriate and could be supported for proposed housing sites if the criteria or factors such as, infrastructural capacity, traffic impact, character of the local area, existing development intensity, planning objectives, lot size, incorporation of 'green principles" and impact of the proposed development in the area concerned are satisfied".*

[175] It was recommended in the said draft guidelines that based on *"Bench Mark Methods"* used to determine the proposal for the cut-off limits for residential density, that a variation range of 30% and/or a weighted variation be applied, based on the size and density of the development. In this case it would be residential medium densities that is applicable, which is usually 125 habitable rooms per hectare and the maximum floors above road level would see a variation in percentage of 20-30%.

[176] The said provisions in section 12(2), states that the provisions of sections 11 and 13(4) of the ***TCPA*** are subject to this section. What is clear from this provision is that a fresh application must be made and not amendments to existing applications. Also it is for the Town and Country Planning Authority to make a determination whether to grant such applications to build where the same is not in conformity with the Development Order.

[177] I have not seen any evidence that the Town and Country Planning Authority was engaged in this process to grant the "amendment" to WAMH's application. However, what is blatantly clear on the KSAMC's case is that it granted an amendment to an existing planning permission.

[178] In all the circumstances and on the evidence available to this court, I find that the ***2017 Provisional Development Order***, was a material consideration when KSAMC was granting the planning permit to WAMH; since it is gazetted and it is a useful guide to development. I further make the finding that KSAMC was in breach of its

statutory duty when it failed to refer WAMH's application to the Town and Country Planning Authority, especially where there were clear and numerous instances of breaches of the ***2017 Provisional Development Order***.

[179] Nowhere in the evidence of the witnesses for KSAMC is it indicated that consideration was given to the fact that the size of the lot would not have qualified it for multi-family development. Significantly, no "compelling reasons" were advanced as to why this was allowed in the circumstances.

[180] In the event that I am wrong to find as such, I nevertheless in the alternative make the finding that with the significant breaches as illustrated by the claimants and noted previously at paragraph [116] above, this particular case was not suitable for the *De Minis* waiver to be applied. I say this based on the fact that there were several significant breaches which do not fit within the criteria stated in the guidelines for its application, the most significant of which is that WAMH's building proposal exceeded the maximum density restrictions on a lot smaller than half an acre.

[181] In theforegoing circumstances I find that the planning and building permission granted by the KSAMC was not granted according to the procedural requirement as stipulated in the ***TCPA*** and the ***NRCAA***.

Ground 3

The 2nd and/ or 3rd Defendant acted in bad faith and in breach of the principles of fairness, natural justice and the claimants' legitimate expectations when it agreed to hear the claimants' concerns prior to considering the application by WAMH Development Limited, but proceeded to consider and grant the environmental permit without affording the claimants' the promised opportunity to be heard.

[182] The specific relief that is being sought is a declaration to the effect that the defendants failed to give the claimants an opportunity to be heard after they were made aware of the claimants concern in respect of the issuing of the relevant permits to WAMH.

[183] Counsel Mr. Goffe contended that the claimants had submitted a letter of objection penned by Mr. Michael Young, the 1st claimant, and were promised an opportunity to be heard, but this did not materialise. This he contends amounts to a breach of fairness, natural justice and legitimate expectation.

[184] Counsel for NEPA and the NRCA has submitted quiet forcefully that the inability to meet with the claimants did not amount to bad faith and it is also clear that no legitimate expectation could arise from the failure of Mr Knight to meet with the claimants as he had no responsibility to do so.

[185] Based on the evidence in this case it does not appear that the defendants are disputing that the claimants concerns and views ought not to have been considered. However, it would appear from the evidence and the sequence of events that the claimants concerns were not taken into consideration as the planning permit was granted shortly thereafter.

[186] The phrase "natural justice" has been one constantly debated because there is a certain vagueness in its term and usage. Notwithstanding its debated meaning, there is no debate that it ought to prevail, particularly where administrative law is concerned. In the local decision of **Derrick Wilson v The Board of Management of Maldon High School and Other** [2013] JMCA Civ 21, Harris JA stated 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. In Sir William Wade's Administrative Law (6th Edition) at pages 496 and 497, the learned author placed this proposition in the following context:*
>
> *"As the authorities will show, the courts took their stand several centuries ago on the broad principle that bodies entrusted with legal power could not validly exercise it without first hearing the person who was going to suffer. This principle was applied very widely to administrative as well as to judicial acts, and to the acts of individual Ministers and officials as well as to the acts of collective bodies, such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing was just as much a canon of good administration as of good legal procedure. Even where an order or determination is unchallengeable as regard its substance, the Courts can at least control the preliminary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration."*

[187] As it relates to legitimate expectation the learned authors HWR Wade and CF Forsythe in the text ***Administrative Law***, 9th edition at page 500, opined that "*the classic situation in which the principles of natural justice apply is where some legal right, liberty or interest is affected"*. In dealing with the issue of legitimate expectation I find it necessary that the framework of the law must be outlined for a proper analysis of the issue to be conducted. In examining the issue of legitimate expectation in the circumstances of an application for judicial review I have found the case of ***Council of Civil Service Unions v Minister for Civil Service*** (supra) a necessary starting point.

[188] Lord Diplock at page 408 to 409 of the judgment adumbrated that:

> *"Judicial review, … provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the "decision-maker" or else a refusal by him to make a decision. To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:*
>
> *(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or*
>
> *(b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision in class (b) a "legitimate expectation," rather than a "reasonable expectation," in order thereby to 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..."*

[189] This court has also found guidance on the subject provided by Lord Woolf MR in case of ***R v North and East Devon Health Authority Ex parte Coughlan*** [2001] Q.B. 213. In this case his Lordship considered the court's role in situations where what is in issue, is a promise made by a public authority as to how it would behave in the future when exercising a statutory function. I have also hereunder reproduced a summary of the helpful points found in the decision of ***Legal Officer's Staff***

Association and Tasha Manley et al v The Attorney General et al [2015] JMFC FC 3 as found at paragraph 45 of the judgment of McDonald-Bishop JA:

> *" (i) Where a member of the public has a legitimate expectation that he will be treated in a way and the public authority wishes to treat him or her in a different way, the starting point is to ask what in the circumstances the member of the public could legitimately expect. The question is: "But what was their legitimate expectation?" (re Findlay [1985] AC 318,338, per Lord Scarman).*
>
> *(ii) Where there is a dispute as to this, this has to be determined by the court and this will involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which it was made, and the nature of the statutory or other discretion. There are three possible outcomes of such enquiry by the court.*
>
> *(iii) In the first category, the court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here, the court is confined to reviewing the decision on Wednesbury grounds (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223). In the case of this first category, the court is restricted to reviewing the decision on conventional grounds. The test will be rationality and whether the public body had given proper weight to the implications of not fulfilling the promise.*
>
> *(iv) In the second category, the court may decide that the promise or practice has induced a legitimate expectation, for example, of being consulted before a particular decision is taken. Here the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it (see Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629). In such a case, the court will itself judge the adequacy of the reason advanced for the change of policy taking into account what fairness requires. In the case of this second category, the court's task is the conventional one of determining whether the decision was procedurally fair.*
>
> *(v) In relation to the third category, where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, the court will, in a proper case, determine whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy. In the case of this third category, the court has to determine, when necessary, whether there is a sufficient overriding interest to justify a departure from what has been previously promised.*
>
> *(vi) The court having decided which of the categories is appropriate, its role in the case of the second and third categories is, demonstrably, different from that in the first category. In many cases the difficult task will be to decide into which category the decision is to be allotted. There are cases that demonstrate the difficulty in segregating the second category (procedural) from the third category (substantive) and so in such cases, no attempt is made, and rightly so, to draw the distinction."*

[190] It has been established in the case of **Francis Paponette and Others v The Attorney General of Trinidad and Tobago** [2011] 3 WLR 219, that the initial burden lies on the applicant (member of the public) to prove the legitimacy of his expectation. However, where it is that the elements of expectation have been proven then the burden shifts to the authority to identify any overriding interest that requires the frustration of the legitimate expectation.

[191] In the light of the nature of the claim brought by the claimants herein and the discretionary reliefs they seek, it seems prudent for the court, in keeping with the established rule of practice, to conduct its independent assessment to see whether the claim to a legitimate expectation and the alleged breach of it have been made out as a matter of law on the evidence. The court has considered the facts on which the claimants are relying that there was a legitimate expectation and the court has found that there is none arising.

[192] From the evidence there is no distinct promise that was made to the legal officers that there would have been consultation or a meeting with the claimants before any of the permits were granted. Also this is not a case in which there is an established practice of consultation in such matters and it was not done. Neither is this a case where it could be argued that there was a statutory provision that the claimants could rely on, that points to a legal right vested in them to be consulted before any permit was granted.

[193] The court finds that the failure of Mr Knight to consult with the claimants did not amount to a breach of legitimate expectation. The right to be heard does not always necessitate an oral hearing or an audience.

[194] In this situation natural justice could have been achieve by the consideration of the claimants' objection letter, but to meet the threshold of natural justice in this particular case, there was no need for an actual hearing or audience. The court finds that the justice of the situation required that the claimants' letter was to be considered and this does not necessarily have to be a hearing or seeking audience

with Mr. Knight or the Authority. In the affidavit of Mr. Peter Knight it was stated that the letter was considered but it was not submitted to be considered by the board members at their meeting and at which board meeting WAMH's application for an environmental permit was subsequently granted.

[195] It is this court's finding that if the subject matter to be discussed fell within Mr. Knight's purview then the justice of the situation would at least have required that the contents of the letter be considered at the board meeting and the claimants made aware of this by return correspondence. In any event as was submitted by Mrs. Reid-Jones, the meeting requested by the claimants related to building approval, an issue that was within the competence of the KSAMC as that body has sole responsibility for issuing building permits. Mr. Knight had no influence over the actions of KSAMC and, therefore, a meeting with him regarding this particular issue would have achieved nothing. In this regard I find that the claimants' complaint is without merit and this ground fails.

Ground 4

In granting the enviornmenral permit, the 2nd and/ or 3rd Defendant failed or refused to consider relevant and material considerations, including the legitimate concerns of the claimants', and the consistent breaches of the law and the 2nd and/ or 3rd Defendants directives committed by WAMH Development Limited.

[196] NEPA and the NRCAhave stoutly refuted the claimants' complaint of failing or refusing to give due consideration to the concerns that were raised in relation to WAMH's operations and alleged breaches that were occurring at the premises. In support of their denial the NEPA and the NRCA have relied on the affidavit evidence of two witnesses, that of Ms. Deborah Lee Shung, Manager, Legal Services Branch (NEPA) and Mr.Miguel Nelson, Manager Enforcement Branch (NEPA).

[197] It appears that when Ms. Lee Shung initially corresponded with the claimants she was then under the mistaken perception that M&M was still the proprietor in fee simple of the premises at 17 Birdsucker Drive. This led her to indicate to the

claimants that an environmental permit had been legitimately issued in respect of the building process and that the developer had not breached any of the provisions of the ***NRCAA*** incuding sections 9(2); 13(1)(b) and 12(1). Accordingly, she took the view that the developer could not be "halted nor could NEPA properly issue a cessation order".

[198] NEPA avers that when Ms. Lee Shung became aware of her erroneous perception, steps were taken to investigate and correct the alleged existing breaches. According to Mr. Nelson, when he was informed by Legal Services Branch of the change in ownership from M&M to WAMH ,he caused a records check to be made at NEPA and verified that there was no existing environmental permit issued to WAMH, relative to 17 Birdsucker Drive.

[199] Consequently on the 27th April 2018, NEPA caused a site inspection to be conducted at the premises and noted that "development had commenced", there was however, no evidence offered to this court as to the extent of the development at that point. Accordingly, Mr. Nelson caused a site warning notice to be served on WAMH for *"construction of 10 rooms or more without an environmental permit".* WAMH was further instructed *"to cease the construction activities with immediate effect and apply for an environment permit".*

[200] It was thereafter on 2nd May 2018 that WAMH submitted an application for an environmental permit for the construction of twelve (12) one (1) bedroom apartment units in a single four (4) storey building. On the 7th May, 2018, similar applications were submitted for licences to construct and operate a sewage treatment plant and the discharge of treated effluent into the environment.

[201] On 8th May 2018, a second site inspection was conducted by NEPA and the following observations were noted:

i. Althought WAMH was still not in possession of an enviornmental permit, construction was still ongoing.

ii. Although a site warning notice was in effect instructing that construction activites were to halt, WAMH had continued construction in defiance of the notice.

[202] As far as this court is concerned, WAMH in the above circumstances, has not exhibited good faith or demonstrated any respect for or obedience to lawful orders given by NEPA.

[203] Mr. Nelson seems to have been of the view that a second site warning notice would not have been effective and after consultation and discussions with the site inspection officer, he determined that enforcement actions should be escalated and a cessation order be issued. Such an order was served on WAMH on the 14th May 2018.

[204] Thereafter and notwithstanding the wanton disregard for law and order, on the 15th May 2018, the NRCA favourably considered the applications for an environmental permit and licence and the same were granted to WAMH on the 27th July, 2018. There seem to have been no site inspections done between 15th May and 27th July 2018. Mr. Nelson conceded that because of the decision to grant the applications "no further enforcement action was taken against WAMH with respect to constructing without an environmental permit". The claimants insist that all during this period the construction and building process continued unabated. I have accepted this evidence as true, having regard to Mr. Nelson's evidence, and WAMH's penchant for totally disregarding the previous site warning notice and cessation order.

[205] On the 27th July 2018 there was a further inspection conducted at the premises by another enforcement officer along with Mr. Nelson. The following observations were made:

"a.The fourth (4th) floor was under construction

b.Ten (10) of the twelve (12) approved units had been constructed

c.Only major structural walls had been constructed

d. No internal partitioning walls were constructed; and

e.The development was being constructed in general accordance with the approved plan."

[206] I question whether the building process was in accordance with the approved plan having regard to the noted breaches that even Mr. Nelson himself observed. The environmental permit was granted to facilitate the construction of twelve (12) one (1) bedroom apartment units. More specifically under the heading ***"Description of Permitted Activity"*** greater details as to the total size of the development and individual units are indicated as follows:

"Total floor area of the development is 1914.27 square metres on a lot size of 1553.36 square metres of land

Units nos. 3,4,8 and 9 – 111.37 square metres

Units nos. 5,6,10 and 11 – 108.95 square metres

Units nos. 7 and 12 – 108.95 square metres"

[207] The information provided above, accounts only for the specification of ten (10) units, whereas the approval is for twelve (12) units. Notably, there is no indication of the approved size of units 1 and 2. To my mind, this renders the planning/building permit incomplete and allows for the integrity of the process to be questioned as irrational. Am I to conclude that having regard to the total size of the development that these two (2) unapportioned units are to be in excess of 400 square metres each?

[208] Mr. Nelson had not recorded any observations as to whether or not the measures specified as a condition to granting the environmental permit were being implemented or had been implemented by WAMH as at the last site inspection visit, or indeed whether the previous breaches averred by the claimants had abated or ceased.

[209] It is my conclusion that the evidence does disclose that there were in fact serious breaches of the law and the planning and building permit which was granted by the

KSAMC and which were not addressed by that Authority and as allowed by their law. Whilst indeed, there were breaches of the site warning notice issued by NEPA, I also reiterate that once NEPA became aware of such breaches they had taken steps and had escalated enforcement action and had imposed the more serious measure of a cessation order. There is no evidence which indicates that there were further breaches of the directives given to WAMH after the issuance of the environmental permit by NEPA. In the circumstances the claimants' complaint against the NEPA and the NRCA in this regard, is not substantiated.

Ground 5

The 2nd and/or 3rd Defendants' decision to grant the environment permit was affected by the conflict of interest of one of its directors or advisors who has or had an interest in the land and the outcome of the environmental permit.

[210] The claimants did not present any evidence or arguments to advance this ground.

The Party Directly Affected (WAMH)

[211] WAMH has contended through submissions made by counsel Mrs. Gentles-Silvera, that, in December 2017 they had applied to KSAMC not for permission to develop land pursuant to section 11 of the ***TCPA***, but rather for an amendment to the planning and building permission which had been granted on 18th February 2016 to M&M. Accordingly, "*the building permission granted by KSAMC was granted under the Kingston and St. Andrew Building Act*".

[212] WAMH has further contended that in such circumstnces it was sections 15 and 22 of the ***TCPA*** which was applicable to its situation. In particular section 15(4) which stipulates that where a development permission is granted, "*it enures for the benefit of the land and of all persons for the time being interested therein*". This, therefore, means that successors in title such as WAMH are entitled to the benefit of such prior permits.

[213] It is prudent that I should at this point carefully scrutinize the application that was submitted by WAMH to KSAMC and determine what was in fact requested. The application seems to be a standard form and bears the number "2017- 02001 PB01008" and is captioned as follows:

"KINGSTON & ST. ANDREW CORPORATION

Application For Building & or Planning Permission

The KSAC Building Act (1883), the Building Code 2006, The Town and Country planning Act 1957, Confirmed Kingston Development Order (1965)"

[214] The application is dated 22nd November 2017. It recites that the application is submitted for consideration of 3 sets of plans for multi-family development situated at Lot 17 Birdsucker Drive, St. Andrew.The application is signed by Wayne Marsh and dated the said 22nd November 2017. At the section "APPLICATION TYPE" the box next to option "PLANNING AND BUILDING PERMIT" is ticked. The applicant's details are handwritten on the form to include such details as it name, WAMH Development Limited; phone number and postal address. Other details provided by the applicant are, the property's legal information and type of development (proposed use).

[215] The "proposed use" at section 'v' of the form is indicated as "residential development", specifically, "APARTMENTS". Under part 'vi' the nature of development (project work description) is indicated as "new". The total floor area and total combined floor area are indicated but are illegible on the copies provided to this court. The proposed number of habitable rooms is indicated as "26". I have noted that although WAMH is now contending that what it had applied for was "an amendment to the building permit", nowhere is it evidenced on the face of the document that this was what they had in fact applied for.

[216] It is KSAMC which has averred that "the building and planning approvals granted to WAMH by the 1st Defendant were granted as an amendment to a previously

approved multi-family residential development on the same property…" What I understand KSAMC to be saying, is that, the decision to treat the application as an amendment was that of KSAMC and this, therefore, belies WAMH's assertion that what it had applied for was an "amendment". Further, KSAMC, which is the relevant Authority accepts that the permit that it granted to WAMH in December 2017 was in fact subject to the provisions of section 11 of the ***TCPA***.

[217] WAMH contends that their application properly falls within the ambit of section 22 of the ***TCPA*** since it was an amendment. I have closely examined the provisions of section 22 and the understanding that I have gleaned is that this provision allows the Authority, in this case KSAMC to make modifications to permits previously granted under Part III. This provision allows the Authority on its own volition to make such modifications and revocations, but does not seem to embrace an application being made by a grantee of a previous permit. In any event where the Authority invokes section 22 then it must obtain confirmation by the Minister.

[218] In this case there is no evidence of any confirmation by the Minister or that indeed any such order was submitted to the Minister for his confirmation. If I am to take WAMH's arguments relative to section 22 to its logical end then it would be a foregone conclusion that KSAMC acted ultra vires the proviso to section 21 (1) which stipulates that:

> *"Provided that no such order shall take effect unless it is confirmed by the Minister, and the Minister may confirm any order submitted to him for the purpose either without modification or subject to such modifications as he considers expedient".*

[219] In the foregoing circumstances, it is my view that the evidence in this case does not, therefore, support WAMH's submission that the amended permit it obtained from the KSAMC is not subject to the provisions of section 11 of the ***TCPA***. In fact, at the top of the application form, the ***TCPA*** is clearly denoted as one of the relevant statutes. As to whether or not KSAMC was obliged to ensure that the environmental permit had been granted before issuing the "amended approval" I have already determined this issue in the affirmative.

[220] Whatever it is that WAMH believed it was entitled to, pursuant to the ***TCPA*** or any other statute, WAMH clearly appreciated that up to December 2017, it *"had no environmental development permit issued in its name. It did not get one until 31st May, 2018".* WAMH's subsequent action of applying for and obtaining an evironmental permit, I have inferred to be a concession on its part, that it was obliged to make an application to NEPA to obtain environmental permit and licences, after the premises was transferred to new proprietors.

[221] WAMH has submitted several inconsistent and contrary views as to what its obligations were in respect of obtaining an environmental permit. In one instance it indicated ignorance of fact that WAMH *"needed to seek **another** approval from NEPA"* [emphasis added]. This was in circumstances where it had not sought any permit at all. WAMH also posited ignorance of the fact by asserting that it *"honestly believed the permit granted to M&M was valid and transferrable"* to it. This is in the face of the specific conditions of the non-transferable clause contained in the M&M permit itself. WAMH has also asserted that it had sought legal advice and was advised that it need not obtain a permit from NEPA. Yet again WAMH has asserted that it had not sought a permit from NEPA *"seeing that the KSAC would have contacted NEPA at the point of granting us the approval for amendment".* In light of the inconsistent and in some instances mutually exclusive assertions I am left to question the sincerity of WAMH's explanations as to why it failed to secure an environmental permit in order to legitimize its development and construction project at 17 Birdsucker Drive.

[222] When contemplating the remedies sought by the claimants, I cannot ignore issues raised, such as the possible prejudice to third parties and the impact on administration. I will also have to look determine whether in granting the relief sought, whether this will serve any practical purpose in the circumstances.

[223] In my analysis of these issues I have given consideration to the judgment of **Queen on the Application of Andrew James Graham v London Borough of Greenwich** [2002] EWHC 2713 Admin, delivered November 26, 2002, which deals

with the issue of 3rd parties in grating relief. However this case is quite distinguishable as the claimant in that matter had waited until the building construction was way advanced. In that case his Lordship Sullivan held that it would be quiet unrealistic for the court to grant relief of quashing the planning permission.

[224] I have also considered the case of ***R (on the application of Gavin) v Haringey*** [2003] All ER (D) 57. I quote extensively from the judgment of Richards J, detailing how he dealt with a similar issue and in granting relief where there was a clear procedural breach by an authority:

> *"69. If that argument were accepted, it seems to me that it would be tantamount to saying that a developer is under an obligation to monitor the lawfulness of the steps taken by a local planning authority at each stage of its consideration of a planning application. In my judgment it would be wrong to go down that line. It is not warranted by the legislative scheme, which places the relevant responsibilities on the local planning authority; and it would give rise to practical difficulties if applicants were required at each stage to check on the authority's discharge of its responsibilities. Applicants for planning permission are entitled to rely on the local planning authority to discharge the responsibilities placed upon it. They should not be held accountable for the authority's failure to comply with relevant requirements, at least where, as here, they cannot be said to have caused or contributed to that failure by their own conduct. In that respect I see no distinction of principle between a private individual acting for himself and a substantial developer with professional advisers.*
>
> *90. The conclusion I have reached is that I should refuse an order quashing the planning permission. It is unnecessary to repeat what I have said about each of the relevant factors. I stress that, in the claimant's favour, I attach substantial weight to the fact that the failure to comply with the publicity requirements and the EIA requirements were serious procedural errors and that the claimant has been denied an opportunity to make representations in opposition to a development that affects his home. I also bear in mind that the claimant is not to blame for the delay. But there has been undue delay within s.31(6) and it has been a very long delay; and to quash the planning permission after that lapse of time and in the circumstances now existing would in my judgment cause very substantial hardship or prejudice to Wolseley. The adverse financial consequences for Wolseley, even taken at their lowest, are very large and are not to be discounted by reference to the speculative possibility that the fresh application for planning permission might succeed or that full enforcement action might not be taken or that losses might be recouped by a claim in damages against the council. Even allowing for the criticisms of Wolseley's conduct, to the extent that I have accepted them, I take the view that the hardship or prejudice to Wolseley is a sufficient reason for the refusal of a quashing order. To grant such an order would also be detrimental to good administration, but in the event I do not need to rely on this as a factor tipping the balance in favour of refusal.*
>
> *91. The same considerations against the grant of relief do not apply to the declaration sought by the claimant as an alternative to a quashing order. To declare that the council failed to comply with the relevant publicity requirements*

> *and EIA requirements would serve to underline the council's failings and would provide some satisfaction to the claimant, but without affecting the validity of the planning permission itself or therefore of works carried out pursuant to it. It may not be strictly necessary, since this judgment can speak for itself, but I think it appropriate in all the circumstances to grant such a declaration.*
>
> *92. In his judgment on the permission application Elias J said that "[I]n substance it seems to me I have to try and determine where the lesser injustice is caused" (para 20). The court is in my view engaged in a similar exercise at the substantive stage, within the framework of s.31(6). In my judgment the outcome in this case that produces the lesser injustice is that the claimant should succeed to the extent of obtaining declaratory relief but that a quashing order should be refused."*

[225] WAMH like the developer in ***Haringey*** had no obligation to monitor the lawfulness of the steps taken by a local authority and cannot be faulted because KSAMC did not observe the requirement to have regard to the provisions of section 9 of the ***NRCAA*** before issuing a planning/building permission. Unlike ***Haringey*** however, WAMH was under an obligation to make an application to NEPA and to secure an environmental permit prior to commencement of construction. In that regard the circumstances in the instant case are distinguishable.

[226] WAMH ought to have known what its legal obligations were, it is Mr. Marsh's evidence that he had taken legal advice on this issue, and even if WAMH was misled as he indicated, WAMH had the benefit of the precedent set by M&M and had in their possession that prior environmental permit granted in 2016. Furthermore the terms of the 2016 permit made it pellucid that WAMH could not benefit from that permit as the benefits were not transferrable. I, therefore, do not accept WAMH's utterances that it was ignorant in fact and in law.

[227] Another distinguishing factor in this case is that the claimants did not wait until the construction was far advanced to voice their greviances. They had begun their agitation and to question the viability and legality of WAMH's enterprise as soon as they saw the land been cleared. In late 2017 when the claimants learnt of a proposed development consisting of one and two bedroom units, they wrote to the then Mayor, Senator Delroy Williams, voicing their objections. This letter was subsequently copied to NEPA in January 2018 where the claimants sought further information

from NEPA, regarding regulations affecting such a proposed building project and then learnt that the maximum density was 30 habitable rooms per acre.

[228] The claimants sought and secured an audience with the developers and asked pertinent questions concerning the proposed building project and raised concerns as to how the proposed development touched and concerned the applicable restrictive covenant. WAMH indicated the following to the claimants:

- The proposal was to build one bedroom, 2 bath units which were convertible to two bedrooms (14 units in total),
- The building site or size of the premises was 0.38 of an acre,
- There was no need to modify the restrictive covenant, and
- They were advised that the maximum permissible density for the area was fifty (50) habitable rooms per acre.

[229] The claimants also wrote to NEPA seeking clarification regarding the environmental permit and requested that the developers give a copy of the intended plans to them. Specifically Mr. Andrew Henry, one of the principals of WAMH was asked to supply drawings and emailed plans to the claimants. Those plans were for construction of a three-storey apartment building, comprising of twelve (12) two-bedrooms, two and a half bathrooms units and two studios, a total of 38 habitable rooms. It is to be noted that the amendment granted to WAMH by KSAMC was to move from a multi-family development of twelve (12) studios on a single two-storey block to a multi-family development of twelve (12) one-bedroom units on a single three -storey block. This would have amounted to twenty-four (24) habitable rooms, so clearly the utterances made by the developers as to what they intended to construct had exceeded what was permitted by the KSAMC.

[230] A copy of the said drawings was exhibited in this case for the court's perusal and indeed this court observed that the drawings clearly depicted two (2) bedrooms and

two an a half (2.5) bathrooms in twelve (12) units, plus two (2) additional units for studio apartments. This would amount to a total of thirty-eight (38) habitable rooms.

[231] The claimants having observed certain discrepancies regarding the proposed building plans had made further enquiries of NEPA and were informed, that the premises was the subject of an environmental permit, *"to Undertake Enterprise, Construction or Development in a Prescribed Area, pursuant to the Natural Resources Conservation (Permits and Licences) Regulation, 1966"*. Therefore, the claimants were misled by NEPA, albeit, not by deliberate deceit.

[232] Mr. Marsh in a responding affidavit indicated that the drawings sent to the claimants were sent in error and those were not the plans that were submitted to KSAMC for approval. I accept the latter utterance that indeed the drawings emailed to the claimants were not the ones approved by KSAMC. However, I do not accept that those drawings were erroneously sent to the claimants. I say this for the following reasons:

I. It is no coincidence that WAMH had prior to emailing the drawings had orally represented to the claimants their intention to build 2 bedroom units;

II. WAMH had cause real estate agencies such as Sagicor and Valerie Levy and Associates to advertise on their websites, 2 bedroom, three bathroom units for sale costing $28,000,000 each;

III. When the claimants brought the above publication to WAMH's attention, no effort was made to withdraw or correct the representation of two bedroom units for sale on the several websites;

IV. The valuation report prepared by Oliver's Property Services and dated 12th March 2018, spoke to two bedroom units, this valuation was submitted to National Commercial Bank (NCB) for facilitation of a loan.

As far as this court is concerned the above is evidence of WAMH's dishonesty and demonstrates their lack of regard for orders made by relevant authorities.

[233] What has WAMH built? It seems to me that they have breached the terms of the planning permission that was ill advisedly granted by KSAMC. To say that KSAMC had approved a four (4) storey building is misleading. I note that the approved plan was for the construction of twelve (12), one (1) bedroom apartment units on a single three (3) -storey block with parking facility at grade level. This, therefore, meant that none of the apartment units were to be constructed at ground level. The approval granted by KSAMC also provided that *"failure to comply with the conditions"* as enumerated in the planning and building permission (N0. 2017-02001PB01008) "*and the approved plans will be considered a breach and will render this approval* ***NULL and VOID****".* There were special conditions imposed for noise abatement, dust control, solid waste management landscaping and advertisement. The permit specifically stipulated that failure on the part of persons to comply with any of the special conditions above, "*will be liable to prosecution".*

[234] As far as the evidence goes there were breaches of both the general and special conditions as set out in the planning/building permit to include misrepresentation of units sizes of two (2) bedrooms wherein the approval was for one bedroom units, noise and dust nuisance. There is no indication that any inspection was undertaken by KSAMC nor indeed was any prosecution of WAMH initiated by the KSAMC.

[235] The hardships that WAMH now allegedly face are of their own making. By their own conduct, they have blatantly disregarded the provisions of the law, exceeding the scope of the planning and building permit and hastening to complete the construction well ahead of schedule, when they were well aware that concerns had been raised by the claimants and legal action was imminent or had in fact been instituted. The evidence as contained in the 2nd affidavit of Wayne Marsh stated that at the point of swearing his affidavit the development was 85% completed. Also it was submitted by counsel that the development by WAMH at the point leading up to the trial was 99% completed and that WAMH had secured a large loan to construct the said apartments.

Remedies

[236] Having made the findings that the defendants had breached the provisions of the ***TCPA*** and the ***NRCAA*** respectively and have exceeded their jurisdiction, should I grant the remedies sought by the claimants?

[237] The claimants have sought the following orders:

> *"1. An order of Certiorari to quash the 1st Defendant's approval to construct a three storey multi-family development consisting of twelve one- bedroom units at 17 Birdsucker Drive, Kingston 8 in the parish of Saint Andrew*
>
> *2. An order of Certiorari to quash the 2nd and 3rd Defendants grant of an environmental permit to WAMH Development in connection with a three storey multi-family development consisting of twelve one-bedroom units at 17 Birdsucker Drive, Kingston 8 in the parish of Saint Andrew*
>
> *3. An order of Mandamus to compel the Defendants to take steps to halt all construction at 17 Birdsucker Drive, Kingston 8 in the parish of Saint Andrew that is in breach of any laws, regulations or orders over which they have jurisdiction."*

[238] Counsel Mrs Reid-Jones in her usual pointed and succinct submissions has argued that an order for certiorari, a discretionary remedy which is usually issued by a court to a lesser tribunal that acted ultra vires or outside its powers, should not be ordered against NEPA and the NRCA. She further submitted that they did all they could do to ensure that the development was done in accordance with the ***NRCAA***, given that as soon as it came to the attention of the 2nd Defendant NEPA that the property was transferred to WAMH and the environmental permit issued to the previous owners was not transferrable, appropriate action was taken to first warn WAHM to halt construction in the form of a site warning notice and further a cessation order.

[239] As it relates to the granting of an order for mandamus which seeks to compel the defendants to take steps to halt all construction, counsel submitted that mandamus can only be issued to compel an authority to do its duty and since NEPA and the NRCA do not have a duty of construction then such an order should not be granted.

[240] The learned authors H.W.R Wade and C.E Forsythe at page 619 of their text ***Administrative Law*** reasoned that:

> *"Like certiorari and prohibition, mandamus is a discretionary remedy…It may also be refused where a public authority has done all that it reasonably can to fulfil its duty… The court always retains discretion to withhold the remedy where it would not be in the interest of justice to grant it. But where no such question arises the remedy will be granted, and the court may even deny that discretion exists".*

[241] At page 624 the authors went on to explain how it is that a certiorari and mandamus operates:

> *"Mandamus is often used as an adjunct to certiorari. If a tribunal or authority acts in a matter where it has no power to act at all certiorari will quash the decision and prohibition will prevent further unlawful proceedings. If there is power to act, but the power is abused (as by breach of natural justice or error of law), certiorari will quash mandamus may issue simultaneously to require a proper rehearing.."*

[242] Either remedy may be used by itself. Defective decisions are frequently quashed by certiorari without any accompanying mandamus. Once the decision has been annulled, the deciding authority will recognize that it must begin again and in practice there will be no need for a mandamus. If on the other hand mandamus is granted without certiorari, the necessary implication is that the defective decision is a nullity, for it is only on this assumption that the mandamus can operate. "*A simple mandamus therefore does the work of certiorari automatically.*"

[243] It is my conclusion that the order requesting a certiorari for the quashing of the planning permission should be granted as the KSAMC was in breach of the TCPA in granting the planning permission without following the procedure stipulated in the relevant Act. I also found that in addition to the breaches the TCPA there were several breaches of the Provisional Development Order. Similarly, the conclusion that I have arrived at in regards to the 2nd Defendant is that a certiorari should be granted as the 2nd Defendant acted ultra vires when they issued the environmental permit after a planning permission was already granted in contravention of the relevant provisions of the ***TCPA*** and ***NRCAA.***

[244] As it relates to the order of mandamus against the defendants I am of the view that such an order can be granted as a discretionary remedy and that it can be granted adjunct to a certiorari. However, as it relates to an order of mandamus against NEPA and the NRCA. I agree with counsel Mrs Reid-Jones that it would be impractical as

the defendants functions are administrative and there is no statutory duties that they can be compelled to execute in the circumstances of this case.

Disposition

[245] The decision I am minded to make is a rather difficult one. I have considered that the claimants have satisfied me that the permits granted by the defendants herein are ultra vires and susceptible to Judicial Review. In these circumstances, I find that the planning authority in this case, the KSAMC, was in breach of its statutory duties and that they failed to follow the procedural rules provided in the ***TCPA***. I also find that it had no jurisdiction to grant an application where there were several breaches of the ***2017 Provisional Development Order***. NEPA, who is the agent of the other relevant authority NRCA, exceeded its jurisdiction as it had no power to grant an environmental permit retrospectively and I have found that the environmental permit granted to WAMH in this case is null and void. Consequently the construction at 17 Birdsucker Drive is not supported by any legal authorization.

[246] On the other hand I have also considered the evidence that is before the court in the 2nd Affidavit of Wayne Marsh that the developers have expended substantial amount of monies in constructing the apartment complex at the disputed premises; and also that third parties have made deposits and are engaged in agreements for purchase and that WAMH would be gravely prejudiced if the remedies sought are granted in the claimants' favour.

[247] Adverse financial consequences for the developer in my view might have tipped the balance of the scale in WAMH's favour as this could cause substantial financial hardship and prejudice to them. However, this discretion should only be exercised in favour of a party who is blameless in respect of the failure of a relevant Authority to follow statutory provisions and procedural rules. Such a party must come with clean hands to the court. I have taken this as the pivotal factor at this stage and in granting the orders sought by the claimants for quashing the planning/building and environmental permits. In these circumstances I think that the lesser injustice would be for the claimants to succeed to the extent of not merely obtaining declaratory

orders but also the grant of an order for certiorari quashing the permits granted by the KSAMC, NEPA and the NRCA.

Orders

1. An order of certiorari to quash the 1st Defendant's approval to construct a three-storey multi-family development consisting of twelve one-bedroom units at 17 Birdsucker Drive, Kingston 8 in the parish of Saint Andrew.

2. An order of certiorari to quash the 2nd Defendant's grant of an environmental permit to WAMH Development Limited in connection with a proposed three storey multi-family development consisting of twelve one-bedroom units at 17 Birdsucker Drive, Kingston 8 in the parish of Saint Andrew.

3. An order of mandamus to compel the 1st Defendant to take steps to halt all construction at 17 Birdsucker Drive, Kingston 8 in the parish of Saint Andrew that is in breach of any laws, regulations or orders over which they have jurisdiction.

4. Costs to be costs in the claim.

……

G. Fraser J