[2025] JMCA Civ 16

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE BROWN BECKFORD JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2021CV00010

BETWEEN	**KINGSTON & ST ANDREW MUNCIPAL CORPORATION**	**APPELLANT**
AND	**MICHAEL YOUNG**	**1st RESPONDENT**
	JACQUELINE YOUNG	**2nd RESPONDENT**
	ANJULE McLEAN	**3rd RESPONDENT**
	DELROY McLEAN	**4th RESPONDENT**
	JOY PATEL	**5th RESPONDENT**
	NARAN PATEL	**6th RESPONDENT**
	MARLYN GRINDLEY	**7th RESPONDENT**
	ERROL THOMAS	**8th RESPONDENT**
	SANYA GOFFE	**9th RESPONDENT**
	GAVIN GOFFE	**10th RESPONDENT**
	NATIONAL ENVIRONMENT & PLANNING AGENCY	**11th RESPONDENT**
	NATURAL RESOURCES CONSERVATION AUTHORITY	**12th RESPONDENT**
	WAMH DEVELOPMENT LIMITED	**13th RESPONDENT**

CONSOLIDATED WITH

SUPREME COURT CIVIL APPEAL NO COA2021CV00011

BETWEEN	**NATIONAL ENVIRONMENT & PLANNING AGENCY**	**1st APPELLANT**
AND	**NATURAL RESOURCES CONSERVATION AUTHORITY**	**2nd APPELLANT**
	MICHAEL YOUNG	**1st RESPONDENT**
	JACQUELINE YOUNG	**2nd RESPONDENT**
	ANJULE MCLEAN	**3rd RESPONDENT**
	DELROY MCLEAN	**4th RESPONDENT**
	JOY PATEL	**5th RESPONDENT**
	NARAN PATEL	**6th RESPONDENT**
	MARLYN GRINDLEY	**7th RESPONDENT**
	ERROL THOMAS	**8th RESPONDENT**
	SANYA GOFFE	**9th RESPONDENT**
	GAVIN GOFFE	**10th RESPONDENT**

Mrs Rose Bennett Cooper and Miss Sidia Smith instructed by Bennett Cooper Smith for Kingston & St Andrew Municipal Corporation

Miss Faith Hall and Miss Jevaughnia Clarke instructed by the Director of State Proceedings for the National Environment and Planning Agency and the Natural Resources Conservation Authority

Mr Gavin Goffe instructed by Myers, Fletcher & Gordon for the 1st to 10th respondents in both appeals

24 November, 17 December 2021 and 20 June 2025

Administrative Law – Judicial Review – Locus standi – Whether owners and residents of nearby properties to a development have standing to seek judicial review of the actions of the planning and environmental authorities in the exercise of the discretion to grant permits to build – Meaning of "sufficient interest" in the Civil Procedure Rules – Whether the respondents were

interested persons within the meaning of the Civil Procedure Rules – Civil Procedure Rules Part 56 – Town and Country Planning Act, s 6(3) – Town and Country Planning (Kingston) Development Order 1966, s 11

Statutory interpretation – Building and planning laws – Building and planning permission acquired by predecessor in title to land for construction of apartment complex – Planning permit attaching to land – Whether environmental permit runs with the land - Effect of grant of planning permit before environmental permit is granted – Whether statutory provision requiring a developer to have environmental permit before planning permit is granted is mandatory – Whether grant of environmental permit after building and planning permit is ultra vires and invalidates the permits – Whether subsequent breaches of the planning and building permits by the developer invalidates the permits in any event – Town and Country Planning Act, s 11 – Natural Resources and Conservation Act, s 9

Administrative Law – Judicial Review – Application for certiorari and mandamus – Whether local planning authority acted ultra vires – Whether environmental authority acted ultra vires – Whether local planning authority in breach of duty to act – Whether local planning authority can be compelled to take steps to halt all construction that is in breach of any laws, regulations or orders over which they have jurisdiction – Civil procedure Rules, Part 56 – Building Act 2018 s10 - Town and Country Planning Act, ss 5, 6, 7, 10, 11 and 13 – Town and Country Planning (Kingston) Development Order 1966 - Town and Country Planning (Kingston and St Andrew and the Pedro Cays) Provisional Development Order 2017 – Natural Resources Conservation Authority Act, s 9 (2) – Natural Resources Conservation Authority (Permits and Licences) Regulations 1996, regulation 7

F WILLIAMS JA

[1] I have read the judgment of Edwards JA in draft and I agree with nothing to add.

EDWARDS JA

Introduction

[2] This matter involves two appeals and a counter-notice of appeal arising from a decision of G Fraser J ('the learned judge') made on 17 December 2020, in an action for judicial review. In that decision, the learned judge granted orders in favour of the 1st to 10th respondents, ('the respondents'), who were the claimants in the court below, against the Kingston and St Andrew Municipal Corporation ('KSAMC') and the National

Environment and Planning Agency ('NEPA'). The orders were made in respect of planning, building and environmental permits granted by those authorities in relation to a building development which was being constructed by WAMH Development Limited ('WAMH') at 17 Birdsucker Drive, Kingston 8, in the parish of Saint Andrew, which the 1st to 10th respondents in both appeals and who are the appellants in the counter-notice of appeal ('the 1st to 10th respondents') alleged was being constructed in breach of the applicable laws. The learned judge also refused to grant orders against NEPA and the Natural Resources Conservation Authority ('the NRCA') in favour of the 1st to 10th respondents, for breach of natural justice. The counter-notice of appeal was filed by the 1st to 10th respondents against the decision of the learned judge not to grant orders in their favour against NEPA and the NRCA for that breach.

[3] Although WAMH is listed as the 13th respondent in the KSAMC's appeal, the company was not served with the appeal and did not take part in the hearing before this court. These two appeals were consolidated in a case management order made by a single judge of appeal, in chambers.

[4] The decision from this court is long overdue and is being delivered at this time with apologies for the delay. I offer no excuse for this inordinate delay and can but only point to the length and complexity of the issues involved and the voluminous bundles of documents filed, all of which have been painstakingly examined, as being major contributing factors to the delay.

The parties

[5] The 1st to 10th respondents are all purported owners or residents of properties in close proximity to the impugned development. The 1st and 2nd respondents, Michael Young and Jacqueline Young, are said to be the registered proprietors of 20 Birdsucker Drive. The 3rd and 4th respondents, Anjule McLean and Delroy McLean, also reside at that property. The 5th and 6th respondents, Joy Patel and Naran Patel, are said to be the registered proprietors of property at 1 Lloyd's Close. The 5th respondent is the sister of the 1st respondent. The 7th respondent, Marlyn Grindley, is said to be the registered

proprietor of 4 Lloyd's Close, whilst Errol Thomas, the 8th respondent, is said to be the registered proprietor of 22 Birdsucker Drive. The 9th and 10th respondents, Sanya Goffe and Gavin Goffe, are said to be residents of 2 Lloyd's Close. The 9th respondent is the daughter of the 1st respondent.

[6] It was averred in the affidavit of Mr Young, which was filed in support of the fixed date claim form, in the court below, that the development at 17 Birdsucker Drive is situated to the east of the properties at 2 and 4 Lloyd's Close, which share a boundary with it. It is also said to be in close proximity to the property at 1 Lloyd's Close and is situated across the street, and to the west of the properties at 20 and 22 Birdsucker Drive.

[7] It is to be noted that no documentary evidence to substantiate the 1st to 10th respondents' relationship to the respective properties was placed before the court below. However, there appears to have been no substantial challenge to these facts, by evidence or otherwise, before or during the trial. Mention was made at the hearing of the appeal, of the 'curious' lack of documentary evidence in this regard, but no serious submission or argument was put forward in dispute of these facts. This appeal, therefore, proceeded on the basis that the respondents were/are owners and/or residents of the respective properties, as pleaded in the court below.

[8] The KSAMC is the local planning authority for the Kingston and St Andrew municipality with responsibility for assessing applications for building and planning permission, and for enforcing planning laws and regulations within the municipality. It is also the Building Authority for the purposes of the Kingston and St Andrew Building Act ('Building Act') (It is to be noted that a new Building Act was passed 9 March 2018 and came into effect 15 January 2019, repealing the Kingston and St Andrew Building Act but this case is not concerned with that 2018 Act).

[9] NEPA is an executive agency created pursuant to the Executive Agencies Act, which operates under the auspices of the Ministry of Economic Growth and Job Creation,

and which has the mandate to carry out, as agent, the functions of three statutory bodies, namely: the NRCA, the Town and Country Planning Authority, and the Land Development and Utilisation Commission ('the LDUC'). NEPA is responsible for the protection of the environment, the management of natural resources, and the use of land and spatial planning in Jamaica and is not an incorporated body.

[10] The NRCA is a statutory body created pursuant to the Natural Resources Conservation Authority Act ('NRCAA'), which has the mandate, inter-alia, to manage "the physical environment of Jamaica so as to ensure its conservation, protection and proper use of its natural resources" (see section 4 of the NRCAA). The NRCA is responsible for granting environmental permits and licences for enterprise, construction and/or development in certain areas. Applications are received, reviewed and processed by NEPA, which then submits them to the NRCA for its consideration.

[11] WAMH is the development company which, at the material time, owned the premises at 17 Birdsucker Drive, undertook the development and was the recipient of the permits, the validity of which was reviewed by the learned judge.

The procedural history and background to the claim

[12] The genesis of this matter is centred around WAMH's construction of an apartment complex at 17 Birdsucker Drive. WAMH became the registered proprietor of that property on 16 January 2018. The property had been previously owned by M & M Jamaica Limited ('M & M'). M & M had obtained an environmental permit from the NRCA on 2 June 2016, and building and planning permission from the KSAMC (then known as the Kingston & St Andrew Corporation), on 15 June 2016, to build a two-storey multi-family residential development with 12 studio apartment units.

[13] WAMH, having acquired the property at 17 Birdsucker Drive, later applied for planning and building permission from the KSAMC to develop 12 one-bedroom units, with parking beneath a section of the building, at that location. The KSAMC treated WAMH's application as one for an amendment of the previous planning permission granted to M

& M and permission to WAMH was granted by the KSAMC on 13 December 2017. This was communicated to WAMH by letter dated 19 December 2017. The permission included approval for a single three-storey building, elevator shaft, swimming pool, water tanks, guard house and garbage receptacle.

[14] On 31 January 2018, WAMH was notified, in a letter from the Real Estate Board, that it had been registered as a developer, as per its application. The letter noted that the proposed development scheme was to consist of 12 one-bedroom units for residential purposes.

[15] By letter dated 10 January 2018, addressed to the then Mayor, Senator Delroy Williams, and copied to Mr Peter Knight, Chief Executive Officer of NEPA, Mr Young outlined his objections and concerns regarding the proposed development. He did so in his capacity as owner of the property at 2 Lloyd's Close, which, he said, is beside the relevant property. The issues he raised involved (a) potential breaches of restrictive covenants; (b) the negative impact of the type of sewage system being proposed; (c) the excess in the allowable density; (d) the potential negative impact of the development on lighting and airflow; (e) the possible reduction in property values in the area; and (f) the non-compliance with the law in respect of the entrance and exit to the development.

[16] At that juncture, construction had not yet begun.

[17] By letter dated 30 January 2018, NEPA responded to Mr Young, through its legal services manager, Mrs Deborah Lee Shung, acknowledging and addressing each concern outlined in Mr Young's letter. It was noted, in that letter, that the property was the subject of an environmental permit to undertake enterprise, construction or development in a "Prescribed Area" under section 9(2) of the NRCAA and that the permit was for the "construction of a two-storey multi-family development consisting of 12 studio units", which "satisfied the applicable planning and environmental standards", and, therefore, was "within the allowable density for the locality". It was also indicated that the structure was unlikely to impact the lighting and airflow of Mr Young's house, and that two-storey

structures were normally permitted for single family residential dwellings. It was further pointed out that the development had received approval from the National Works Agency ('NWA') in relation to: the potential problem with the proximity of the proposed ingress/egress point to the T-junction; the fact that no licence had been issued or applied for in relation to the construction and operation of a sewage facility, which was required; and that a search was to be conducted as to whether an application had been made to modify the restrictive covenant preventing buildings other than private dwellings.

[18] It later became known that the environmental permit referenced by Mrs Lee Shung was the one granted to M & M, and that, based on the relevant law (section 7 of the NRCAA (Permits and Licences) Regulations), that permit was not transferable to the new owner, WAMH.

[19] On 27 April 2018, having been informed of the change in ownership of the relevant property, and finding no record of an environmental permit having been granted to WAMH, NEPA conducted a site inspection at 17 Birdsucker Drive and issued a 'Site Warning Notice' to WAMH. The notice indicated that there was a breach of the NRCAA caused by the construction of 10 or more rooms without an environmental permit, and requiring WAMH to "[c]ease the construction activities with immediate effect and apply for an environmental permit". At that time, construction was at foundation level.

[20] WAMH wrote to NEPA on 1 May 2018, indicating that it had not been aware that it was required to apply for an environmental permit and that it now intended to apply for a permit. It also requested permission to continue construction whilst the application was being considered. It received no response to this request.

[21] WAMH applied for an environmental permit on 2 May 2018, and environmental licences on 7 May 2018, for construction and operation of a sewage treatment plant.

[22] On another site visit made by NEPA, on 8 May 2018, it was discovered that construction was ongoing, therefore, enforcement procedures were escalated to a cessation order, which was served on 14 May 2018. The cessation order required WAMH

to immediately cease construction on the premises on account of the failure to obtain the requisite environmental permit. It also ordered WAMH to apply for an environmental permit and a licence.

[23] Mr Goffe wrote to Peter Knight, by email dated 8 May 2018, copied to Mrs Lee Shung and others, purportedly on behalf of the several owners and residents in the community surrounding the development, requesting that the pending consideration of WAMH's application for an environmental permit by the Board of the NRCA be postponed until the parties received documents requested under the Access to Information Act, and to allow time for them to prepare their objection. He also questioned whether Mr Don Mullings, the Chairman of NEPA's LDUC, was the same Don Mullings who was the former owner of the development property (that is as the principal of M & M) and whether he would play a role in the consideration of WAMH's application.

[24] On 10 May 2018, Mr Goffe sent an email to Mr Knight, Mrs Lee Shung and other persons, attaching photographs of the continuing construction at the construction site. Mr Knight responded, by letter dated 11 May 2018, outlining the history of the matter and indicating, *inter alia*, that NEPA, NRCA and the Town and Country Planning Authority were processing a new application in relation to 17 Birdsucker Drive, and that the application would be addressed at a meeting of the Board of the NRCA on 15 May 2015. He further indicated that the concerns of Mr Goffe and Mr Young were really matters concerning building permissions which were within the purview of the KSAMC and not NEPA. He also noted that the action of the KSAMC in amending the planning permission without an environmental permit to WAMH being in place was contrary to the NRCAA and the TCPA, and that NEPA could not take responsibility for that.

[25] On 11 May 2018, Mr Young sent an email to Mr Knight, copied to Bridgett Russell of NEPA, requesting a meeting with Mr Knight and 'his team' to discuss the concerns of the residents in respect of the WAMH development and "breaches to the NEPA approval" prior to the upcoming NRCA board meeting at which WAMH's application for an environmental permit was to be considered. Mr Knight responded to that email, on 14

May 2018, acknowledging receipt and agreeing to arrange a meeting. In his affidavit filed 3 December 2018, Mr Knight accepted that he had agreed to meet with Mr Young as a matter of "good customer service", but was unable to do so due to a "scheduling conflict". However, he noted that Mr Young's concerns would not have been addressed at the NRCA's Board meeting as they related to building permission.

[26] On 15 May 2018, WAMH's applications were considered and approved by the Board of the NRCA. The permit granted permission to WAMH to construct a multi-family housing development consisting of "twelve (12) one-bedroom apartment units on a single 4-storey block" with a strata office, a multi-purpose gym, and a recreational area consisting of a pool, pool deck area, cabana and grass play area on the ground level, as well as an open roof deck.

[27] On 17 May 2018, Mrs Lee Shung of NEPA wrote an email to Mr Goffe, seeking to clarify the enforcement actions that had been taken by NEPA and pointing to the Site Warning Notice, as well as the cessation order that had been issued to WAMH. Mr Goffe responded on the same date with further comments and questions regarding the Site Warning Notice, which he advised had not been provided in relation to his Access to Information Act request. He also requested a copy of the environmental permit, along with the minutes of the board meeting at which the application for same had been considered and approved.

[28] On 17 May 2018, Mr Goffe wrote an email to Mr Knight expressing his disappointment that the environmental permit had been granted, notwithstanding that no meeting had been held with the residents of the community to hear their concerns, especially as he had been informed by Mr Young, that NEPA would have facilitated such a meeting. Mr Goffe enquired whether that meeting would still be facilitated and whether the permit could be revoked following the outcome of any such meeting. Additionally, Mr Goffe raised other concerns as to how NEPA had handled the matter, including the misinformation that had been provided by Mrs Lee Shung regarding the status of the environmental permit for the development, and the issuance of a cessation order on 1

May 2018, when, according to him, none had been issued. He further noted that his request under the Access to Information Act had only been partially satisfied, and that no response had been given in relation to the query as to whether Mr Mullings played a role in the decision-making process regarding the property.

[29] By letter dated 28 May 2018, the NWA, through Winston Hartley, Manager of Development Control, wrote to Mr Knight, in relation to WAMH's application for an environmental permit, noting that the entity had no objection to an environmental permit being granted, subject to certain conditions which were listed in the letter.

[30] On 29 May 2018, the NRCA granted WAMH's application for licences to construct and operate a wastewater treatment plant at the property, as well as to operate a treatment plant for the discharge of treated sewage effluent. WAMH was notified by letters dated 31 May 2018, of the grant of the environmental permit and licenses, which were to take effect on 7 June 2018.

[31] The environmental permit granted permission to WAMH to construct a multi-family housing development consisting of "twelve (12) one-bedroom apartment units on a single 4-storey block" with a strata office, a multi-purpose gym, and a recreational area consisting of a pool, pool deck area, cabana and grass play area on the ground level, as well as an open roof deck.

[32] On 15 June 2018, documents substantiating the enforcement actions that were taken against WAMH were later supplied to Mr Goffe by way of email sent from Nola Wright, NEPA's information officer. Mr Goffe responded by email on the same date, requesting "any document that shows the applicable maximum habitable rooms per acre for 17 Birdsucker Drive". A series of emails passed between the two regarding delay in relation to this request, culminating on 21 June 2018, in the provision of a summary report to Mr Goffe (and others who were copied on the email) containing the information requested. Unfortunately, however, this report was in relation to the application submitted by M & M, in relation to a proposal for the development of 12 studio units, and

the maximum density was expressed therein to be 30 habitable rooms per acre, based on the Draft Kingston & St Andrew Development Order, 2014.

[33] On 27 June 2018, the 1st to 10th respondents filed an *ex-parte* application for leave to apply for judicial review, which was amended on 9 July 2018, seeking various orders of *certiorari* to quash the building approval granted by KSAMC, and the environmental permit granted by NEPA and/or NRCA, as well as an order of *mandamus* to compel those three entities to take the necessary steps to halt all construction that was in breach of any laws, regulations or orders over which they had jurisdiction. The application for leave was heard and granted by a judge of the Supreme Court.

[34] Consequently, on 20 July 2018, the 1st to 10th respondents filed a fixed date claim form, supported by the affidavit of Michael Young, seeking the following reliefs:

> "1. An order of certiorari to quash the [KSAMC'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 St. Andrew;
>
> 2. An order of certiorari to quash the [NEPA's and/or NRCA'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 St. Andrew;
>
> 3. An order of mandamus to compel the [KSAMC, NEPA and the NRCA] 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;
>
> 5. Further or other relief as the court deems just."

[35] These orders were sought on grounds that:

> 1. "The building approval granted by the [KSAMC] 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 [KSAMC].

2. The building approval granted by the [KSAMC] and the Environmental Permit issued by the [NEPA and/or the NRCA] 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 the Pedro Cays) Provisional Development Order, 2017.

3. [NEPA and/or the NRCA] acted in bad faith and in breach of the principles of fairness, natural justice and the [1st to 10th respondents'] legitimate expectations when it agreed to hear the [1st to 10th respondents'] concerns prior to considering the application by WAMH Development Limited, but proceeded to consider and grant the environmental permit without affording the [1st to 10th respondents] the promised opportunity to be heard.

4. In granting the environmental permit, the [NEPA and/or the NRCA] failed or refused to consider relevant and material considerations, including the legitimate concerns of the [1st to 10th respondents], and the consistent breaches of the law and the [NEPA's and/or the NRCA's] directives committed by WAMH Development Limited.

5. The [NEPA's and/or the NRCA's] decision to grant the environmental 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 [1st to 10th respondents] are directly affected by the [KSAMC's, NEPA's and NRCA's] decisions.

7. Other than judicial review, there is no other suitable remedy available to the [1st to 10th respondents].

8. The [1st to 10th respondents] are within the prescribed time limit to file this Fixed Date Claim Form."

[36] On 20 July 2018, the 1st to 10th respondents sought an injunction against the KSAMC, NEPA and the NRCA, as well as WAMH, to restrain WAMH from continuing construction at 17 Birdsucker Drive until the trial of the relevant claim or until further

order of the court. An injunction was also sought to suspend the relevant permits issued to WAMH for the same period. The injunctions were sought based on, *inter alia*, the same matters raised in the claim, as well as that, for reasons set out, the respondents would be severely prejudiced if construction was allowed to continue pending the outcome of the claim. The application was heard and refused by another judge of the Supreme Court on 28 August 2018. This appeal is not concerned with those orders.

The decision of the learned judge on judicial review

[37] The claim for judicial review was heard on 6, 7, 8 and 19 February 2019 and judgment was reserved. On 17 December 2020, the learned judge handed down her written judgment. The learned judge made orders, which were, for the most part, in the terms sought by the respondents (except that order 3 had been sought against all the appellants but was only ordered in respect of the KSAMC). The orders were as follows:

> "1. An order of certiorari to quash the [KSAMC'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 [NEPA'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 [KSAMC] 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."

[38] The learned judge extrapolated seven issues from the evidence and submissions, which, she said, involved questions as to whether the NRCA and NEPA had breached their statutory duties and had acted *ultra vires* the legislation in granting the environmental permit; whether the KSAMC had acted illegally, irrationally, and unreasonably in granting

the building permission; and whether the respondents had a legitimate expectation of being consulted by NEPA and the NRCA prior to the grant of the environmental permit.

[39] In coming to her decision, the learned judge first considered the preliminary issue raised by the KSAMC and ruled that the respondents had *locus standi* to bring the claim as they were persons with "sufficient interest" in the subject matter within the meaning of rule 56.2(1) of the Civil Procedure Rules ('CPR'). This, she said was so, because all the respondents were owners or long term occupiers of properties situated in close proximity to 17 Birdsucker Drive, and that the building and construction activities would result in material changes to those properties as well as the community, so that the respondents would no doubt be affected by such changes (see para. [64] of the written judgment).

[40] The learned judge was also of the view that the respondents were eligible to apply for judicial review based on rule 56.2(2)(f), which entitled "any other person or body who has a right to be heard under the terms of any relevant enactment or the Constitution" to apply. In that regard, she found that the respondents had a right to be heard under section 6(3)(b) and (c) of the Town and Country Planning Act ('TCPA'), being "interested persons" under that section who had a right to object to the development due to their ownership and physical occupation of neighbouring premises (see paras. [70] to [71]).

[41] The learned judge then considered each ground of the claim, in turn, and found that all three entities had acted *ultra vires* their duties. In coming to her decision regarding the actions of the KSAMC, she found that it had acted contrary to the TCPA in granting the building approval to WAMH, and therefore, acted *ultra vires*. The learned judge found that the building approval granted by KSAMC before an environmental permit was granted to WAMH, was in fact granted in breach of section 11(1A) of the TCPA, which mandates the circumstances in which planning approval should be granted where section 9 of the NRCAA applies. She found that, since section 9 of the NRCAA did apply in the circumstances, the grant of an environmental permit to WAMH prior to the grant of building approval was a "matter of substance and not merely convenience". The building approval, in the learned judge's view, was, therefore, invalid.

[42] In relation to the assertion that the building approval granted by KSAMC was illegal as it was made in breach of the Town and Country Planning (Kingston) Development Order, 1966 ('1966 Confirmed Order') and the Town and Country Planning (Kingston and Saint Andrew and the Pedro Cays) Provisional Development Order, 2017 ('2017 Provisional Order'), the learned judge found that since the respondents did not identify any breaches of the 1966 Confirmed Order, she would not address it. However, she found that the 2017 Provisional Order was a material consideration in respect of the grants of the building approval and environmental permit, since it was "gazetted" and it was a "useful guide to development" (see para. [178]). She found that even if it was not in full force, witnesses from the KSAMC, NEPA and the NRCA, had indicated, in their affidavits, that the 2017 Provisional Order had been considered in their assessments. Those entities, she reasoned, should not be permitted to "resile" from their view of the applicability of the 2017 Provisional Order.

[43] In relation to the provisions of the 2017 Provisional Order, the learned judge concluded that the KSAMC had failed to demonstrate that it had taken into account all the relevant factors, particularly that the number of proposed habitable rooms would have led to overdevelopment of the lot, that number having exceeded the allowable limit under the 2017 Provisional Order. Nor was it demonstrated, she said, how that issue had been resolved. The learned judge, therefore, found that the decision to grant the building permit was unreasonable.

[44] The learned judge found, moreover, that the KSAMC breached its statutory duty when it failed to refer WAMH's application to the Town and Country Planning Authority as required by section 12(1A) of the TCPA, where, in this case, there were several clear breaches of the 2017 Provisional Order, particularly in relation to densities and setbacks. Furthermore, she found that even though the 2017 Provisional Order permitted a *de minimis waiver* for the grant of the building approval where densities were higher than the allowable limit, the KSAMC showed no "compelling reasons" as to why this was allowed in the circumstances. She further determined that, in any event, the nature of

the breaches did not fit the criteria in the guidelines for the *de minimis* waiver to be applied.

[45] With respect to the NRCA and NEPA, the learned judge accepted that the environmental permit granted to the previous owner of 17 Birdsucker Drive was not transferable and that WAMH would require its own environmental permit. The learned judge considered whether material factors were considered in granting the environmental permit to WAMH, and found that, whilst NEPA and the NRCA did in fact consider both the 1966 Confirmed Order and 2017 Provisional Order, the decision to grant the environmental permit was illegal, as section 11 of the TCPA, which she found was a mandatory requirement, made it clear that the application and receipt of permits and licences under that section were to precede the commencement of any construction on the relevant premises. She also found that section 9(3) of the NRCAA require an application for an environmental permit to be made and granted "before commencing" construction. The construction, the learned judge found, was at an advanced stage when the permit was applied for and obtained, and she determined that the NRCAA did not provide for an application to be made after construction commenced. The legislation, she concluded, did not lend itself to an interpretation that an environmental permit could be issued after the commencement of construction. This she said was so, notwithstanding that the KSAMC, under the TCPA, had the power to grant building and planning permission retroactively.

[46] Based on this reasoning the learned judge found that NEPA, as agent of the NRCA, had no power to "retroactively" grant the environmental permit to WAMH under the NRCAA. The learned judge further found that, as an environmental permit had not been obtained before construction began, and with no such intention to make a grant having been indicated, in circumstances where the NRCAA did not provide expressly or impliedly for such a permit to be granted "retroactively", the permit would have been granted in excess of NEPA's jurisdiction. The learned judge found, therefore, that the environmental

permit was null and void, and that the construction at 17 Birdsucker Drive was "not supported by any legal authorization".

[47] In that regard, therefore, she found that NEPA acted "in excess of its jurisdiction and did not consider competently and appropriately the application that was made by WAMH in 2018".

[48] The learned judge also found that the complaint that NEPA and or the NRCA failed or refused to consider relevant and material considerations including the respondents' legitimate concerns and the breaches of law and directives committed by WAMH, was not substantiated. This, she said, was because NEPA did, in fact, take action after it became aware of the various breaches of the Site Warning Notice it had issued, and took steps to escalate enforcement action by imposing a cessation order.

[49] Nonetheless, she found that the KSAMC and NEPA had acted *ultra vires* in granting the permits that they did grant, for the reasons she outlined. Having considered the relevant authorities, the learned judge further determined that the complaint that NEPA and the NRCA had acted in bad faith and in breach of the principles of fairness, natural justice and the 1st to 10th respondents' legitimate expectations, in granting the environmental permit without affording them "the promised opportunity to be heard", was without merit. This was due to the fact, as she reasoned it, that (i) no distinct promise had been made to the 1st to 10th respondents that a meeting would be held with them prior to the grant of any permits; (ii) there was no established practice of consultation in matters of that nature; and (iii) there was no statutory provision mandating such a consultation before the grant of a permit.

[50] The learned judge found also, that, in this case, natural justice would have been properly satisfied by a consideration of the 1st to 10th respondent's objection letter by the Board of the NRCA and did not require an oral hearing or meeting. She reasoned, however, that in any event, whilst the justice of the situation would have required Mr Knight to bring the letter to the attention of the Board of the NRCA and to respond in

writing (which he did not) if the matter fell within the purview of NEPA, the meeting sought by the 1st to 10th respondents had to do with building approvals which did not fall within the purview of NEPA but rather the KSAMC. Mr Knight, she found, would have had no influence over KSAMC and thus the meeting would have achieved no purpose.

[51] With regard to WAMH, the learned judge found that the evidence showed dishonesty and a lack of regard for the relevant orders, due to breaches by WAMH of both the general and special conditions set out in the planning/building permits, and by its blatant disregard of the provisions of law, in "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 1st to 10th respondents] and legal action was imminent or had in fact been instituted" (see para. [235] of the judgment].

[52] Therefore, in finding that the permits ought to be quashed, the learned judge considered as a "pivotal factor" that the substantial hardship and prejudice that could be caused to WAMH should only be used to tip the scale in WAMH's favour, had it come to the court with clean hands and was blameless in relation to the failure of the authorities to follow the statutory provisions and rules. Thus, she found, the lesser injustice would be for the 1st to 10th respondents to receive more than merely declaratory relief.

[53] She granted the reliefs sought, as indicated by her orders, having weighed the possible prejudice to the parties on each side, including WAMH, and having considered that WAMH was not blameless in the failures of the authorities to follow the statutory provisions and procedural rules (at paras. [245] to [247] of her judgment).

The KSAMC's appeal

[54] The KSAMC filed an appeal against the decision of the learned judge on 28 January 2021. It based its appeal on grounds so numerous that they traversed the alphabet and half-way round again. It is, therefore, necessary to set them out in full. They are as follows:

"(a) The learned judge erred in law and exercised her discretion improperly when she granted an order of certiorari to quash the [KSAMC'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;

(b) The learned judge erred in law and exercised her discretion improperly when she granted an order of certiorari to quash [NEPA's] grant of an environmental permit to WAHM [sic] Development Limited in connection with a proposed three storey multi-family development consisting of twelve one-bedroom units at Birdsucker Drive, Kingston 8 in the parish of Saint Andrew;

(c) The learned judge erred in law and exercised her discretion improperly when she granted an order of mandamus to compel the [KSAMC] to take steps to halt all construction at 17 Birdsucker Drive, Kingston 8 in the parish of Saint Andrew;

(d) The learned judge erred in law in the interpretation of the provisions of sections 5 and 6 of the Town and Country Planning Act as a result of which she arrived at the incorrect finding that the [1st to 10th respondents] had locus standi by virtue of being neighbours of 17 Birdsucker Drive, Kingston 8 in the parish of Saint Andrew;

(e) The learned judge erred in law in that she failed to appreciate that the test for standing at the leave stage is different from the test of leave at the substantive hearing stage in concluding that the [1st to 10th Respondents] have *locus standi*;

(f) The learned judge erred in that she misinterpreted the evidence and failed to appreciate that the [1st to 10th Respondents] did not establish on the evidence that they have a sufficient interest in the subject matter of the application before the court prior to finding that they have *locus standi*;

(g) The learned judge failed to appreciate that the grounds on which the [1st to 10th Respondents] relied in its (sic) claim below in relation to the [KSAMC] challenged the building approval granted by the [KSAMC] under the Kingston & St. Andrew Building Act in relation to which no breaches were

alleged by the Claimant and that consequently, she had no jurisdiction to quash the said building approval;

(h) The learned judge erred in law and fact in finding that the decision to grant WAMH the building permit is unreasonable in circumstances where there was no allegation or evidence of breaches of the Kingston and St. Andrew Building Act adduced by the Claimants or any party;

(i) The learned judge erred in law and in fact in quashing the building approval granted by the [KSAMC] in circumstances where there was no allegation or evidence of breaches of the Kingston and St. Andrew Building Act adduced by the [1st to 10th Respondents] or any party;

(j) The learned judge erred in law when she concluded that the building approval granted by the [KSAMC] was done in breach of the NRCAA and the TCPA;

(k) The learned judge failed to appreciate that the grounds pleaded by the [Respondents] in its (sic) claim below in relation to the [KSAMC] challenged the building approval granted by the [KSAMC] under the Kingston & St. Andrew Building Act and that consequently, she had no jurisdiction to quash the planning approval issued by the [KSAMC]

(l) The learned judge erred in law when she found that section 11 1(A) of the TCPA is mandatory;

(m) The learned judge failed to consider or alternatively to properly consider the statutory scheme and the object and purpose of the TCPA when she determined that section 11 1(A) requires mandatory compliance;

(n) The learned judge/failed [sic] to apply the applicable test in determining that the provisions of section 11 1(A) of the TCPA are mandatory;

(o) The learned judge erred in law when she concluded that the grant of an environmental permit after building approval invalidated the building approval;

(p) The learned judge did not consider sufficiently, or at all or have sufficient regard for the established legal principles in determining whether a statutory provision is mandatory and

as a result of which she misinterpreted section 11 1(A) of the TCPA;

(q) The learned judge erred in law in finding that the building approval granted by the [KSAMC] was illegal as the proposed development is in breach of the Town and Country Planning (Kingston and Saint Andrew and Pedro Cays) Provisional Development Order, 2017;

(r) The learned judge erred in law and was plainly wrong when she failed to appreciate the legal status of the Town and Country Planning (Kingston and Saint Andrew and Pedro Cays) Provisional Development Order, 2017 and its role as material consideration in the grant or refusal of permission to develop land;

(s) The learned judge's findings that:

a. Mr. Shawn Martin had not demonstrated that he considered the lot size of number 17 Birdsucker Drive as per policy BH1. Alternatively, he failed to appreciate that granting the building permit would lead to over development of the lot as this allowance was exceeded by some 5 rooms;

b. Nowhere in the evidence of the witnesses for the 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;

c. 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;

d. There is no indication that any inspection was undertaken by the KSAMC; are plainly wrong as they are against the weight of the evidence adduced at the hearing of the matter;

(t) The learned judge erred in law and in fact and was plainly wrong when she drew adverse inferences and made adverse

findings of fact in relation to the [KSAMC's] witness, Mr Shawn Martin without the witness being cross-examined on those issues;

(u) The learned judge erred in law and in fact by determining disputes of fact in the absence of cross examination of affiants/witnesses;

(v) The learned judge misinterpreted and misapplied the provisions of the TCPA when she found that there is no jurisdiction within the parameters of the statute which allows retroactive issuance of environmental permits by the Authority or its agent NEPA;

(w) The learned judge misinterpreted and misapplied the provisions of the NRCAA when she found that the NRCA or NEPA have no jurisdiction to issue environmental permits retroactively;

(x) The learned judge's finding that the NRCA or NEPA have no jurisdiction to grant environmental permits retroactively is contrary to the statutory scheme of the NRCA and the TCPA and permits is absurd;

(y) The learned judge erred in law in arriving at her findings that the NRCA or NEPA have no jurisdiction to grant environmental permits retroactively without inviting and/or hearing and considering submissions from the parties;

(z) The learned judge erred in law in relying on authorities (cases unsighted by the parties without inviting and/or hearing and considering submissions from the parties;

(aa) The learned judge's grant of mandamus to compel the [KSAMC] to halt construction is an unlawful incursion and fettering of the [KSAMC's] exercise of its statutory powers under the TCPA;

(bb) The learned judge misinterpreted and misapplied section 12 of the TCPA when she concluded that fresh application must be made and not amendments to existing applications;

(cc) The learned judge misinterpreted and misapplied section 12 of the TCPA as a result of which her conclusion that the KSAMC was in breach of its statutory duty when it failed to

refer WAHM's [sic] application to the Town and Country and Planning Authority is flawed;

(dd) The learned judge failed to properly assess all the circumstances of the case and therefore improperly exercised her discretion to grant remedies of certiorari and mandamus when it was patent on the evidence that the likely effect of the said remedies served no practical purpose given that the developer had already obtained an environmental permit regarding the said development;

(ee) The learned judge erred in law in granting remedies of certiorari and mandamus approximately one year and 10 months after the hearing of the matter in which the evidence was that the development was approximately 95% complete and there was no injunction in place;

(ff) The learned judge erred in law in that she failed to appreciate and consider the likely effect of her decision on the [KSAMC] and on third parties when she granted orders for certiorari and mandamus approximately one year and 10 months after the hearing of the matter;

(gg) In all the circumstances the learned judge was plainly wrong in granting remedies of certiorari and mandamus approximately one year and 10 months after the hearing of the matter and the said decision is contrary to the principles of good administration;

(hh) The learned judge erred in law in granting the discretionary remedies of certiorari and mandamus in circumstances in which the [Respondents] were themselves in breach of planning laws;

(ii) The learned judge erred in law when she failed to consider sufficiently, or at all that the [Respondents] had an alternative remedy which was not pursued".

NEPA and the NRCA's appeals

[55] On 28 January 2021, NEPA and the NRCA also filed an appeal against order 2 of the learned judge's decision to quash the environmental permit granted to WAMH. The grounds of appeal filed are as follows:

"i. The Learned Judge erred in so far as finding that [NEPA and the NRCA] acted in breach of their statutory duty when they granted the environmental permit to WAMH Development Limited after the commencement of the construction process.

ii. The Learned Judge fell in error when she concluded that [NEPA and the NRCA] acted ultra vires their powers under the Natural Resources Conservation Act ('NRCAA') when they retroactively granted an environmental permit to WAMH Development Limited.

iii. The Learned Judge erred in that she wrongfully interpreted and applied a literal interpretation to the provisions under the NRCAA.

iv. The Learned Judge fell in error when she failed to give sufficient consideration [to] [NEPA and the NRCA's] submissions that on a purposive interpretation of the NRCAA [NEPA and the NRCA] possessed the powers to grant the environmental permit retroactively to have WAMH Development Limited come into compliance with the provisions of the NRCAA.

v. The Learned Judge erred when she applied the wrong interpretation to the use of the word "shall" in sections 9(2) and 9(3) of the NRCAA and concluded that it is mandatory in nature and not directory.

vi. The Learned Judge erred in law when she held that the environmental permit granted by [NEPA and the NRCA] to WAMH Development Limited was null and void.

vii. The Learned Judge erred in law when she wrongly exercised her discretion is [sic] granting the order of certiorari against [NEPA and the NRCA] in circumstances where [NEPA and the NRCA] ensured that the granting of the environmental permit was done in accordance with the NRCAA."

The 1st to 10th respondents' counter-notice of appeal

[56] In their counter-notice of appeal, filed on 8 February 2021, the 1st to 10th respondents contended that the judgment of the learned judge should be affirmed on the grounds stated by her, and additionally or alternatively, on the ground that:

> "1. [NEPA's] failure to honour its promise to meet with the 1st respondent prior to approving the environmental permit to discuss 'the concerns of the residents…especially in light of the breaches of NEPA's approval that we can observe' was in breach of the Respondents' legitimate expectation of consultation in the specific manner promised."

The issues

[57] The appeals and the counter-notice of appeal raise a myriad of issues which, for convenience, I have attempted to categorise, as follows:

(1) whether the learned judge erred in finding that the 1st to 10th respondents had *locus standi* to bring the claim (grounds d, e, and f of the KSAMC's appeal);

(2) whether the 1st to 10th_respondents' challenge was to the building approval granted under the Building Act and, therefore, there was no jurisdiction to quash the planning approval granted under the TCPA (grounds g, h, I and k of the KSAMC's appeal);

(3) whether the learned judge was wrong to find that the grant of the building permit was unlawful where no breach of the Building Act was alleged or proved (grounds h, I, and k of the KSAMC's appeal);

(4) whether building approval was granted in breach of the NRCAA and the TCPA (grounds j and bb of the KSAMC's appeal);

(5) whether the planning and building approvals were illegal as a result of breaches of the 1966 Development Order and the 2017 Development Order (grounds q and r of the KSAMC's appeal);

(6) whether section 11 (1A) of the TCPA is mandatory and therefore the grant of the planning permit was *ultra vires* (grounds j, l, m, n, o and p of the KSAMC's appeal);

(7) whether the learned judge erred in holding that the grant of the environmental permit after the grant of the planning permit was *ultra vires* (grounds o, v, w, x, and y of the KSAMC's appeal and grounds i, ii, iii, iv and v of NEPA and the NRCA's appeal);

(8) whether the learned judge was wrong to grant orders of *certiorari* against NEPA (grounds b, dd, ee, ff, gg of KSAMC's appeal and grounds ii, vi and vii of NEPA's and the NRCA's appeal);

(9) whether the KSAMC was in breach of its duty in failing to refer WAMH's application to the Authority (grounds cc and bb of the KSAMC's appeal);

(10) whether the learned judge's findings of fact were against the weight of the evidence (grounds, s, t and u of the KSAMC's appeal);

(11) whether the learned judge was wrong to grant an order of *certiorari* against the KSAMC (grounds a, g, h, I, j, k, dd, ee, ff, gg, hh of the KSAMC's appeal);

(12) whether the learned judge was wrong to grant an order of *mandamus* to compel the KSAMC to investigate and halt the building works (grounds c, q, r, aa, dd, ee, ff and gg of the KSAMC's appeal);

(13) whether the learned judge was wrong to determine an issue not joined between the parties nor argued without inviting and/or hearing submissions from the parties (grounds y and z of KSAMC's appeal);

(14) whether it mattered that the 1st to 10th respondents were also in breach of planning laws or that they had alternate remedies (grounds hh and ii of the KSAMC's appeal);

(15) whether the 1st to 10th respondents had a legitimate expectation to meet with NEPA prior to the grant of the environmental permit to WAMH by the NRCA (1st to 10th respondents' counter-notice of appeal).

Issue 1 - whether the learned judge erred in finding that the 1st to 10th respondents had the *locus standi* to bring the claim (grounds d, e and f of the KSAMC's appeal)

(i) Submissions

[58] Counsel for the KSAMC, Mrs Bennett-Cooper, submitted that the 1st to 10th respondents had no *locus standi* to bring the claim for judicial review. She based this assertion on the provisions of Part 56, particularly rule 56.2(1), which, she said, sets out who may apply for judicial review. She argued that the 1st to 10th respondents had no interest in the subject matter of the application, which was the building approval granted to WAMH. Counsel submitted that the building approval was granted by the KSAMC under the Building Act, and that the planning permission was granted under the TCPA. She asked the court to note that these were two separate pieces of legislation under which differing functions were to be carried out.

[59] Counsel also asked this court to note that the application for judicial review sought to challenge the building approval granted, but that the 1st to 10th respondents had failed to indicate or show which aspect of the Building Act had been breached, or any loss sustained as a result of any such breach. Since, Part 56 of the CPR provides that judicial review may be applied for by a person affected by the relevant decision, the 1st to 10th respondents had failed to show that they were persons with sufficient interest in the subject matter of the claim. Counsel argued that the respondents needed to show that they had sufficient interest in the subject matter being reviewed, which was the building approval. There was no basis, therefore, counsel contended, for any order regarding the approval granted under the Building Act.

[60] Counsel asked the court to note that in none of the affidavits filed by Mr Young did he allege that the grant of the building approval had affected him. Counsel also asked the court to note that all the complaints of breaches were with regard to construction following the grant of the building approval. This, counsel insisted, did not reflect on the initial grant of the building approval and did not make that approval bad.

[61] Counsel further submitted that, although Mr Young, in his affidavit, made the bald unsubstantiated claim that the 1st to 10th respondents owned and resided near the site of the development, an adjoining property owner does not, solely by virtue of being a neighbour, have sufficient interest to challenge building approval. There is no provision in the Building Act, the TCPA, or any of the development orders, it was submitted, mandating consultation with neighbours before building permission could be granted. The learned judge, counsel argued, erred when she found that the respondents were interested parties under sections 5 and 6 of the TCPA, by virtue of being neighbours of 17 Birdsucker Drive, since those sections had nothing to do with planning permission, but rather, the procedure in relation to the preparation of a provisional development order. Counsel noted that the provisions in section 6 of the TCPA that allow a property owner or lessee to object as an "interested person", solely relate to an objection to a provisional development order, which is not the same as a right to be heard on an application for building approval arising from that provisional order.

[62] In the circumstances, it was submitted, the only way for the 1st to 10th respondents to have standing would have been to show a breach of duty on the part of the planning authority and that they had been adversely affected or were likely to be adversely affected, which they failed to do. The learned judge, it was said, erred in finding that the building and construction activities would result in material changes to 17 Birdsucker Drive, adjoining properties, and the community, when there was no evidence to substantiate such a finding.

[63] Regarding the issue of delay, counsel submitted that the respondents did not apply for judicial review promptly and had been out of time. The delay, she said, would have affected their standing, since Part 56 indicated that the claim must be filed within three months of the building approval being granted. Instead, the claim was filed six months after. Counsel said that WAMH had been severely prejudiced by the late claim, because it had properly obtained the building approval.

[64] Counsel for the 1st to 10th respondents, Mr Goffe, submitted that they had sufficient interest as persons who had been "adversely affected by the decision" and that they were also persons who had a right to be heard. Counsel relied on rule 56.2 of the CPR and the text, Wade & Forsythe Administrative Law, 7th edition, at pages 708 to 709. Counsel maintained that the courts now take a more liberal approach to the question of standing, citing **Jamaicans for Justice v Police Service Commission and the Attorney General** [2015] JMCA Civ 12.

[65] Counsel pointed out that the learned judge found that the respondents had sufficient standing on the basis of Part 56, and on the basis of the TCPA. These were two independent bases, he said. Furthermore, there was no necessity to show actual harm, counsel argued, for if this was necessary, then no one would be able to make a challenge before construction began. He submitted that judicial review was the proper remedy.

[66] On the issue of delay, counsel maintained that delay was a descending bar and should not be inflated. Delay, he said, was not argued in the court below.

(ii) Analysis and disposal of issue 1 and the grounds relating thereto

[67] The issue here is whether the 1st to 10th respondents had the standing to bring judicial review proceedings by virtue of being persons with sufficient interest in the subject matter, inclusive of those who claim to have been adversely affected by the decision to grant the approvals to WAMH. This means that the 1st to 10th respondents would have had to show that they had sufficient interest either by virtue of them having been adversely affected by the grant of the approvals/permits (rule 56.2(2)(a)), or by virtue of some other factor. It has been conclusively determined that the factors listed at (a) to (f) of rule 56.2(2) of the CPR are not exhaustive.

[68] It is prudent to begin this analysis with an examination of Part 56 of the CPR. Rule 56.2 provides as follows:

"(1) An application for judicial review may be made by any person, group or body which has **sufficient interest in the subject matter** of the application.

(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 fall 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." (Emphasis added)

[69] In their pleadings, the 1st to 10th respondents claimed to have been adversely affected by the decisions made by the KSAMC, NEPA and the NRCA.

[70] Although an order for *certiorari* to quash the KSAMC's approval to construct a three-storey multi-family development was amongst the relief sought by the 1st to 10th respondents in their claim for judicial review, they did not specify which approval they wanted quashed. The grounds on which they sought the orders, however, referred to the "building approval" granted by the KSAMC. Building approval is granted pursuant to section 10 of the Building Act. Planning permission is granted under section 11 of the TCPA. The approvals under the different legislation were largely conflated, both by the learned judge and by the 1st to 10th respondents. For the question of standing, it hardly matters. However, as will be seen later, this conflation looms large in the KSAMC's appeal.

[71] There is no requirement in the Building Act for consultation to be done with the general public or owners and/or residents of neighbouring properties before building approval is granted. Neither does any such requirement exist in the TCPA. That is not to say that Parliament has not paid due regard to the interests of members of the public who may be affected by such matters. The Building Act for instance, provides for a register to be kept of all applications. The Kingston and St Andrew Building (Tribunal of Appeal) Regulations, 1932, provide for objectors to be heard at any appeal hearing from a refusal by the Building Authority to approve any plan or drawings (regulation 4). Section 11(4) of the TCPA provides that the local planning authority is to keep a register containing the particulars of applications and decisions made in relation to such applications, with respect to lands within the area for which the order applies, which should be available for inspection by the public at all reasonable hours. Section 23(2C) of the TCPA provides that a list of enforcement notices issued pursuant to the legislation be published from time to time.

[72] It is plain, therefore, that Parliament had in mind the fact that, for whatever reasons pertinent to them, there may be persons who may be affected by building and planning permissions that have been granted to other persons. Of course, for the purpose of bringing a claim, interest more than mere curiosity, would have to be demonstrated to amount to sufficient interest.

[73] Mr Goffe helpfully provided an extract from Administrative Law by Sir William Wade and Christopher Forsyth, tenth edition, pages 629 to 631. That extract discusses the meaning of the phrase "any person aggrieved". It is said there, relying on **R v Hendon Rural District Council exp. Chorley** [1933] 2 KB 696, that a neighbour is a person aggrieved for the purpose of obtaining a quashing order (when not barred by statute). The editors also point to the fact that the strictures on standing have been relaxed, and the approach of the court is now on a "broader basis" as was taken in **Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd** [1982] AC 617 (**Inland Revenue Commissioners' case**).

[74] The more relaxed broad-based approach was adopted by this court in **Jamaicans for Justice v the Police Service Commission and the Attorney General**. In that case, despite strong objection from the non-governmental and citizen/human rights advocacy organization, the Jamaicans for Justice ('JFJ'), a superintendent, against whom several human rights violations had been alleged, was promoted to the rank of senior superintendent. As a result, JFJ applied for leave to apply for judicial review of the decision of the Police Service Commission ('PSC') to promote the officer, and was granted said leave. The subsequent claim was dismissed, however, because although the JFJ had the requisite "standing" to bring the claim, the claim, otherwise failed for the several reasons set out in the judgment of the court. The JFJ filed an appeal challenging those reasons and the Police Service Commission filed a counter-notice of appeal against the decision on standing.

[75] In considering the question of standing, Morrison JA (as he then was), considered the basis upon which leave is usually refused for lack of standing. He considered the **Inland Revenue Commissioner's case**, and more particularly the statements made by Lords Wilberforce and Diplock. He also considered three other cases which had been considered by the judge at first instance in the JFJ's claim, as well as those that had been cited by counsel in the appeal. The cases on which the judge at first instance relied were: **R v Inspectorate of Pollution and another, ex parte Greenpeace Ltd (No 2)** [1994] 4 All ER 329, **R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd** [1995] 1 All ER 611 and **R (Feakins) v Secretary of State for the Environment, Food and Rural Affairs** [2003] EWCA 154. Those cases all endorse an increasingly more liberal approach to standing in recent years. Having reviewed those cases, Morrison JA, in **Jamaicans for Justice v the Police Service Commission and the Attorney General**, concluded that the judge at first instance had been correct to find that the JFJ had standing to bring judicial review of the Police Service Commission's actions. In coming to that conclusion, this is what Morrison JA had to say, at paras. [70] and [71]:

> "[70] In my view, this unbroken line of authority, springing from various parts of the common law world in a variety of circumstances, amply validates B Morrison J's felicitous reference [at para [90] to 'the benevolent advance of a liberal approach to standing'. The requirement in rule 56.2(1) that an applicant for judicial review should have a sufficient interest in the subject matter of the application must therefore be read in the context of the developed law of standing, without recourse to what Lord Diplock dismissed in **Inland Revenue Commissioners case** in (1981) [at page 641] as 'technical restrictions on locus standi… that were current 30 years ago or more.'
>
> …
>
> [71] As the cases show, the liberal approach to standing has been at its most pronounced in cases with a public interest in preserving the rule of law or, where applicable, a constitutional dimension. In such cases, it seems to me, the courts have been less concerned with the right which a particular applicant seeks to protect than with the nature of the interest which it is sought to vindicate."

[76] At para. [72] Morrison JA concluded:

> "…I would approach the question of the sufficiency of JFJ's interest by taking into account, first, the nature of JFJ and the extent of its interest in the issues raised; second, the powers and/or the duties in law of the PSC; third, whether, if JFJ were to be denied standing, those persons it represents would have any effective way to bring the issues before the court; and fourth, the nature of the relief sought."

[77] Although the case of **Jamaicans for Justice v the Police Service Commission and the Attorney General** went on appeal to the Privy Council, this court's decision in relation to standing was not appealed and was not disturbed.

[78] Sometime after the hearing of the appeal in the instant case, the attorneys for the 1st to 10th respondent provided the court with the case of **John Mussington and another v Development Control Authority and others** [2024] UKPC 3, a decision of the Privy Council arising from an appeal from the Court of Appeal of the Eastern Caribbean Supreme Court. The case was also served on the appellants. No objections,

comment or submissions on that case was received from any of the appellants. In the light of that fact and though coming late in the day, I determined that it was worth considering, as the issues discussed therein may have an important bearing on this case.

[79] **John Mussington and another v Development Control Authority and others** dealt with the issue of whether the appellants, two residents of the island of Barbuda (one a marine biologist and retired principal, the other a retired teacher), had the standing to challenge the grant of a development permit for the construction of an airstrip on the island of Barbuda. The Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda) had dismissed the appellants' application for judicial review, on the basis that they had failed to establish that they had the necessary standing to seek judicial review of the Development Control Authority's decision to grant the development permit.

[80] The case dealt with, and was decided, solely on the question of standing.

[81] The provisions that were considered by the Board were those contained in the Physical Planning Act 2003, for that island. That statute provides, *inter alia*, that no development is to be commenced or carried out except in accordance with a development permit (section 17). The very involved process, as delineated by the several provisions in the statute, afforded interested parties an opportunity to comment on and make representations on applications for development permits, particularly where an environmental impact assessment is required. These representations were to be considered by the Development Control Authority ('the DCA') (see para. 7 of the judgment). Section 25(2)(a) of the Act provided for the DCA to give consideration to any representation made by any person with regard to the application or its probable effects.

[82] In that regard, I must state from the outset that this statute is different from any of the statutes relevant to the instant case.

[83] The marine biologist felt he was qualified to question the impact of the development of the airstrip on the environment and whether proper procedures had been

followed. A number of the citizens of Barbuda, including the appellants, wrote to the Prime Minister citing the fact that the airstrip was being developed without a development permit and with no proper environmental impact assessment having been done. They asked him to take measures to enforce planning control and to stop the development. There was no reply. Several other letters were written, or caused to be written, by the appellants before they took action in the High Court challenging the construction of the airstrip. Leave was granted to apply for judicial review, as well as an interim injunction prohibiting any further works from being carried out on the airstrip. The interim injunction was set aside on a successful appeal to the Court of Appeal made by the respondents.

[84] Following further disclosures by the respondents, the appellants' made a further application for interim injunction and directions until final hearing of the claim or until further orders, which was refused. The matter of standing having been raised before the court, it was concluded that the appellants would have standing based on section 25(2)(a) of the 2003 Act, which required the DCA to consider representations made by any person regarding the application or likely effect of the application. The court also concluded that any further submissions on the issue would be reserved for trial. The appellants appealed the refusal of the injunction and the respondents counter-appealed the decision with regards to the appellants' standing. The appellants had claimed sufficient interest on the basis that they were persons adversely affected by the development. The Court of Appeal accepted that not every interest qualified as sufficient interest under rule 56.2, and that the common law position that a busybody, or persons applying simply as a citizen, would not qualify for standing to bring judicial review. There must be sufficient interest. In that regard, the Court of Appeal found that the appellants were not adversely affected by the airport development, and were not qualified to bring applications on the behalf of others with sufficient interest. It dismissed the appeal and allowed the counter-appeal on the basis that the respondents had not established standing to bring the judicial review claim.

[85] On appeal to the Privy Council, the Board considered rule 56.2 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (which is in *para materia* to section

56.2 of the CPR), and the judgment of the Court of Appeal. The Board described the rules in Part 56 on standing as "liberal and relaxed" requiring an applicant to show only that they had a sufficient interest in the subject matter. It found the list set out in rule 56.2(1) to be clearly non-exhaustive based on the use of the word "includes" at the start of the rules, citing **Treasure Bay (St Lucia) Ltd v Gaming Authority** (unreported), The Eastern Caribbean Supreme Court, Saint Lucia, Claim No SLUHCV 2011/0456, judgment delivered 25 September 2014, per Ramdhani J at para. 73. The Board also referred, with approval, to the treatment of that section of the rules in Jamaica by G Fraser J, at first instance in this case, cited at **Young v Kingston and St Andrew Municipal Corporation** [2020] JMSC Civ 251, at para. 62. In referencing that case, the Board said the following:

> "The same point was made by Fraser J in the Jamaican Supreme Court (*Young v Kingston and St Andrew Municipal Corporation* [2020] JMSC Civ 251 at para 62) in interpreting identical provisions of the Jamaican Civil Procedure Rules:
>
> > '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 [sic] not closed, but would extend to other eligible persons who qualify as interested persons.'"

[86] The Board further referred to the decision of Jamadar JA (as he then was) in **Dumas v Attorney General of Trinidad and Tobago** (unreported), Court of Appeal, Republic of Trinidad and Tobago, Civil Appeal No P218 of 2014, judgment delivered 22 December 2014, who, the Board said, "undertook an extensive examination of the common law countries' approach to standing, including the Caribbean nations". At para. 37 of **John Mussington**, the Board set out Jamadar JA's conclusions in **Dumas**, and the general considerations that he outlined at para. 95 of that judgment, which, he said, had arisen from a more permissive approach to standing. Those considerations are as follows:

i. "Standing goes to jurisdiction and is to be determined in the legal and factual context of each case. It is a matter of judicial discretion.

ii. The merits of the challenge and the nature of the breach raised are important considerations.

iii. The value in vindicating the rule of law (the principle of legality) is a significant consideration.

iv. The importance of the issue raised.

v. The public interest benefit in having the issue raised and determined.

vi. The bona fides and competence of the applicant to raise the issues.

vii. Whether the applicant is directly affected by, or has a genuine and serious interest and has demonstrated a credible engagement in relation to the issue raised.

viii. The capacity of the applicant to effectively litigate the issues raised.

ix. Whether the action commenced is a reasonable and effective means by which the courts can determine the issues raised.

x. The imperative to be vigilant so as to prevent an abuse of process by busybodies and frivolous and vexatious litigation.

xi. Whether the issues raised are a general or specific grievance and whether there are other challengers who are more directly impacted by the decision challenged, or more competent to litigate it.

xii. The availability and allocation of judicial resources."

[87] On that basis, the Board concluded that there was no material difference between the requirements in the law of the Eastern Caribbean (rule 56.2) and that of England and

Wales (RSC 53(5), and that the same considerations as to standing applied to both. The Board, at para. 46, went on to consider, with approval, the case of **Duff v Causeway Coast and Glens Borough Council** [2023] NICA 22, from the Court of Appeal of Northern Ireland, in which Lady Chief Justice Keegan distilled the principles on standing from the case of **Walton v Scottish Ministers** [2012] UKSC 44 ('**Walton**') which were, to the extent relevant, as follows;

> "(i) A wide interpretation of whether an applicant is a 'person aggrieved' for the purpose of a challenge under the relevant Scottish statutory provision is appropriate, particularly in the context of statutory planning appeals (para 85).
>
> (ii) The meaning to be attributed to the phrase will vary according to the context in which it is found, and it is necessary to have regard to the particular legislation involved, and the nature of the grounds on which the applicant claims to be aggrieved (para 84).
>
> (iii) A review of the relevant authorities found that persons will ordinarily be regarded as aggrieved if they made objections or representations as part of the procedure which preceded the decision challenged, and their complaint is that the decision was not properly made (para 86).
>
> (iv) The authorities also demonstrate that there are circumstances in which a person who has not participated in the process may nonetheless be 'aggrieved': where for example an inadequate description of the development in the application and advertisement could have misled him so that he did not object or take part in the inquiry (para 87).
>
> (v) Whilst an interest in the matter for the purpose of standing in a common law challenge may be shown either by a personal interest or a legitimate or reasonable concern in the matter to which the application relates, what constitutes sufficient interest is also context specific, differing from case to case, depending upon the particular context, the grounds raised and consideration of, 'what will best serve the purposes of judicial review in that context.' (Paras 92 and 93).
>
> (vi) Para 94 also refers to the need for persons to demonstrate some particular interest to demonstrate that he is not a mere

busybody. The court was clear that 'not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it.'

(vii) The interest of the particular applicant is not merely a threshold issue, which ceases to be material once the requirement of standing has been satisfied: it may also bear upon the court's exercise of its discretion as to the remedy, if any, which it should grant in the event that the challenge is well-founded (paras 95 and 103).

(viii) Lord Hope added at para 52 that there are environmental issues that can properly be raised by an individual which do not personally affect an applicant's private interests as the environment is of legitimate concern to everyone and someone must speak up on behalf of the animals that may be affected.

(ix) Individuals who wish to do this on environmental grounds will have to demonstrate that they have a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity (para 53). It will be for the court to judge in each case whether these requirements are satisfied."

[88] The Board having considered the various leading authorities on the subject of standing, including the seminal Scottish cases of **Walton** and **AXA General Insurance Ltd v HM Advocate** [2011] UKSC 46) ('**AXA**'), concluded that:

(1) **Walton** and **AXA** are taken to be authoritative as to standing in judicial review in England and Wales (para. 46).

(2) There is little difference, if any, between the concept of "a person aggrieved" in the Roads (Scotland) Act 1984 and standing for judicial review purposes (para. 47).

(3) The attributes ascribed to "a person aggrieved" in subparagraphs (i), (ii), (iii) and (iv) of Keegan LCJ's summary in **Duff Causeway Coast and Glens Borough Council** apply with equal force to standing in judicial review (para. 47).

(4) The potential noise and disruption that would flow from the operation of the airport in close proximity to the appellants, as well as concerns over the effect of the operation of the airstrip on the quality of the drinking water, showed that both appellants, who lived close to the airstrip, were substantially affected in terms of CPR 56.2(2)(a) (para. 50).

(5) Sufficient interest was also demonstrated from the failure to follow due process. Construction was commenced without a development permit contrary to the mandatory provision of section 17 of the 2003 Act. The consultative process to facilitate representations mandated by the Act was also not followed (paras. 51 and 53).

(6) "Where an application for judicial review involves issues of environmental concern it is not necessary that the applicant demonstrates an expertise in the subject matter". All that is required is that they demonstrate some knowledge, concern for, or a genuine interest in the subject matter (para. 57).

[89] The Board declared itself satisfied that the appellants had demonstrated a sufficient interest in the environmental issues and the breaches of the 2003 Act raised by the application for the development permit. The Board found, in particular, that, as a marine biologist, that appellant's scientific background and "knowledge of the flora and fauna in the area, his status as a local resident, and his experience in conducting environmental assessments" "amply demonstrated" that he had sufficient interest to bring a claim for judicial review (para. 58).

[90] The Board also considered whether, as submitted by the respondent, the appeal was academic because the airstrip had already been substantially built. The Board determined that it was not, since the issue of standing directly related to a live issue, not yet determined, as to whether the grant of the development permit had been made *ultra vires*. The fact that the airstrip was complete, it said, did not render that issue moot as it

would be for a court to determine the remedy to be afforded to the appellants, if it was found that the DCA had acted outside its powers.

[91] In the instant case, the 1st to 10th respondents claim to have sufficient interest as persons directly affected or who are likely to be affected by the grant of the building and environmental permits. They do not claim to be acting in the public's interests, or with any concern for the environment or any environmental impact the development may have. They do not claim to have, nor have they demonstrated or have attempted to demonstrate, any special background or knowledge of the environment or building or planning laws or procedure. Their actions are due largely to their own self-interest, to the extent that they have alleged that failure by the relevant bodies to carry out due process in making the grant, has affected them. Their claim is that the grants have been made in breach of the law, the construction was being conducted by virtue of those illegal permits and that this has impacted them personally, as adjacent property owners. They, therefore, have an interest in seeing to it that these public bodies do not violate the law.

[92] If there was any doubt that these persons would have sufficient interest to bring a claim in the matter, in my view, that doubt would be quelled by the terms of section 17 of the Building Act. By virtue of section 17, a register of all conditional approvals is to be kept by the Building Authority, which is to be kept open for inspection by interested parties at all reasonable times. Certainly, the neighbours to a proposed development would be interested in what is applied for to be built in their "backyard". Clause 11 of the 1966 Confirmed Order calls for a register to be kept by the planning authority of any application relating to land in an area in which the Order applies. The register must list the name and address of the applicant, the date of application, particulars of the development, the decision of the planning authority or any direction given under the TCPA or the Order, date of any appeal, the decision of the Minister on appeal, and the date of any subsequent approval.

[93] This begs the question as to what the purpose of these registers would be. One answer must be that they are meant to alert the public at large and spur into action any

person who may be or is being affected by the development and the permits granted therefor. The respondents have claimed, amongst a myriad of other things, that the permits were not properly granted and are, therefore, illegal. They have also claimed that the appellants not only have a duty to grant said permits in keeping with the law and to see to it that permits are not illegally obtained, but also, that once granted, the permits are complied with. They have said that they have a right to insist that these agencies comply with their own laws, rules and policies. Once these registers are mandated to be open to the public, it is difficult to say that members of the public having viewed them, and having formed the view that permits were unlawfully granted by the granting agency, could not bring a claim, because it is of no concern to them.

[94] Furthermore, and more significantly, the respondents have claimed to be persons who reside directly in the vicinity of the development, and are clearly persons who would be impacted, or are likely to be impacted, one way or the other by the development. To the extent that they are or are likely to be adversely impacted, they have the right to examine how the developer acquired his permits to build and if such permits were granted in accordance with the law.

[95] In my view, where an application is made, or where building, planning and environmental approval is granted resulting in works which are likely to affect, or does adversely affect any person, that person will have sufficient interest in the matter to bring a claim for judicial review of how such permits were granted.

[96] I agree with the contention that the respondents cannot be considered to be busybodies, and I agree with the learned judge that they have established that they have sufficient interest to bring the claim. Borrowing the words of Jamadar JA, in his summary of general considerations, from the very beginning of the development the respondents "demonstrated a credible engagement in relation to the issues raised".

[97] I do not, however, believe that the learned judge was on firm footing when she found that the respondent's interest was supported by sections 5 and 6 of the TCPA, as

those sections simply deal with the right to object to provisional development orders. Since standing has otherwise been shown, this error hardly matters.

[98] Grounds d, e, and f of the KSAMC's appeal, in my view, have no merit. The learned judge's decision on the preliminary issue of standing, therefore, ought to be affirmed.

Issue 2 - whether the 1st to 10th respondents' challenge was to the building approval granted under the Building Act, and therefore, there was no jurisdiction to quash the planning approval granted under the TCPA (grounds g, h, I and k of the KSAMC's appeal)

Issue 3 - whether the learned judge was wrong to find that the grant of the building permit was unlawful where no breach of the Building Act was alleged or proved (grounds h, I and K of the KSAMC's appeal)

Issue 4 - whether the building approval was granted in breach of the NRCAA and the TCPA (grounds J, and bb of the KSAMC's appeal)

(i) Submissions

[99] Mrs Bennett Cooper argued that the learned judge fell into error when she found that there had been a breach of the TCPA and that, therefore, the building approval was invalid, as there was no connection between the Building Act and the TCPA. The challenge brought by the respondents, counsel argued, was to the building approval, which was granted under the Building Act, and not to the planning permission, which falls under the TCPA. Therefore, she argued, the learned judge had no jurisdiction to question any action taken under the latter Act.

[100] Counsel also contended that the learned judge erred when she found that the KSAMC was in breach of the Building Act. Counsel maintained that the complaints which had been raised by the respondents were with regard to the subsequent construction by WAMH, and not with the initial building approval. There had been no allegation that the KSAMC had acted *ultra vires* the Building Act under which building approvals are granted. Counsel further contended that the learned judge was in error in holding that the grant of the building approval, prior to the grant of the environmental permit, was *ultra vires*, as there was no such requirement in the Building Act. Counsel submitted that there was

no legal requirement for the building authority to await the environmental permit before granting building approval.

[101] Counsel Mr Goffe, however, submitted that there had been breaches in the grant of the approval, as well as breaches of the conditions of the approval. Counsel maintained that the approval should never have been granted, and it having been granted, WAMH did not abide by its terms. Counsel argued that although the 1st and 10th respondents' allegation is not that the breaches affected the original grant, they were of the view that the learned judge was correct to stop the development, as the developer was in breach of the approval. Counsel pointed to the fact that, since the building permit itself states that it becomes void if there is a breach of its conditions, and there had been breaches of its conditions, the permit would have been rendered void, in any event. Counsel cited **Regina (Watermead Parish Council) v Aylesbury Vale District Council** [2017] EWCA Civ 152 ('**Aylesbury'**), and submitted that the court was to have regard to what was before the decision maker.

(ii) Analysis and disposal of issues 2, 3 and 4 and the grounds related thereto

[102] It is convenient to dispose of issues 2, 3 and 4 together as they touch and concern substantially the same subject matter.

[103] It is important to note that building approval is granted under the Building Act, and planning permission is granted under the TCPA. The two are discrete pieces of legislation and there is no mention of one in the other. The only limitation on the grant of building approval is to be found in the provisos to section 10 of the Building Act.

[104] Section 10(1) of the Building Act deals with approval of plans to erect or re-erect any building or part thereof. Every person who proposes to erect any building, or part thereof, must give notice to the Building Authority along with an accurate ground plan and an accurate plan (to scale), showing the several floors of the building and an accurate plan showing the frontage of the building to the street or lane. The first proviso to that

is that, amongst other things, no plan will be approved unless, in the opinion of the Building Authority, it is suitable for the locale and proper sanitary arrangements are made.

[105] Approvals under the Building Act are given in writing by the Surveyor or the Building Authority (see section 16). The Building Authority, under the Building Act, is defined as "the Council of the Kingston and St Andrew Corporation appointed and constituted under the provisions of the Kingston and St. Andrew Corporation Act…or such other body…by order of the Minister, substituted for that Corporation for the purposes of [the] Act…". I have read that to mean the body that is now given the nomenclature KSAMC.

[106] The Building Authority may also, at any time before or after the work has commenced, require the builder or owner to submit working drawings or detailed plans, to scale, as the Surveyor (the City Engineer appointed under the Kingston and St. Andrew Corporation Act or other officer appointed by the Building Authority) may prescribe. Those are subject to the same approval procedure. The second proviso to section 10(1) is that the Surveyor may, in his discretion, accept a notice unaccompanied by a plan and approve the building subject to written instructions or direction he or the Building Authority may issue from time to time.

[107] Section 10(2) of the Building Act provides a penalty for building without previously obtaining approval, or for any deviation from an approved plan or "detailed or working drawings", as the case may be, which are offences. The court may order the builder to pay a fine or to demolish the building wrongly erected in deviation from the plan or without approval of a plan. The court may also order that the building be altered to conform to the plan. This is a process driven by the Surveyor and the Building Authority.

[108] Having applied for an order to quash the KSAMC's "approval" for construction of the development, the 1st to 10th respondents set out grounds 1 and 2 of their application as follows:

1. "The building approval granted by the 1st Defendant [KSAMC] 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 [KSAMC].

2. The building approval granted by the 1st Defendant [KSAMC] and the Environmental Permit issued by the 2nd and/or 3rd Defendants [NEPA/NRCA] 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 the Pedro Cays) Provisional Development Order, 2017."

[109] The 1st to 10th respondents' case before the court below, therefore, was based on the allegations that building approval was granted in breach of the TCPA and the NRCAA, which require an environmental permit to be granted prior to any consideration for approval by the KSAMC, as well as in breach of the 1966 Confirmed Order and the 2017 Provisional Order. The KSAMC's argument is based on the fact that the respondents used the term "building approval" rather than "planning permission". This is significant because a contractor or developer requires both a building approval and planning permit from the KSAMC. The Building Act, under which the building approval is granted, however, makes no reference to the TCPA or the NRCAA. It also makes no reference to the environmental permit, confirmed development orders, or provisional orders.

[110] Counsel for the KSAMC is correct that there is no requirement anywhere in the Building Act for the builder to have an environmental permit before submitting or receiving the building approval. Furthermore, there is no requirement in the Building Act for planning permission to be granted under the TCPA before a building approval under the Building Act can be granted. Where a plan was submitted by WAMH to the KSAMC for building approval, and was approved in accordance with the Building Act, there could be no room for a finding that the KSAMC acted *ultra vires* in granting a building approval.

Indeed, counsel is correct that there was no claim and no evidence led that the KSAMC acted in breach of the Building Act in granting the building approval under the Building Act. Of course, the argument could have been made that if the planning permit was wrongly granted first, the building approval ought not to have been granted thereafter, because it would have been unreasonable or irrational to do so, on the basis that the planning permit could not stand, therefore, the builder could not build even with a building approval in hand. However, this is not an argument that was raised before the learned judge, neither was such an argument made before this court.

[111] There was no evidence before the court below that the building plans were approved *ultra vires* the Building Act. There is no requirement for a builder to have an environmental permit before building approval is granted under the Building Act. The building plans approved were for 12 one-bedroom units and the building approval was in conformity with the submitted plans. There was no basis in law, therefore, to hold that the grant of the building approval under the Building Act was illegal, unreasonable or irrational.

[112] The learned judge granted the order of *certiorari* to quash the "approval". On the face of it, it may appear unclear as to which approval was quashed, as two approvals were granted. If it was the "building approval", then the claim would be interpreted to mean the building approval under the Building Act. As counsel for the KSAMC has contended, there was no evidence to support a claim or a finding that the building approval was granted unlawfully. The building approval granted under the Building Act was not granted in breach of any legislation or of any development order, as the Building Act makes no reference to the NRCA or the TCPA, nor to any requirements under those Acts. Counsel for the respondents and the learned judge would have been in error in conflating the planning permission with building approval granted under two separate pieces of legislation, with separate requirements. The error of course would have begun with the pleadings.

[113] This means that if the reference to "building approval" in the claim is a reference to the approval under the Building Act, then straight away the learned judge would have been wrong to grant *certiorari* for the reasons she advanced. Building approval is not made subject to section 11(1A) of the TCPA. There is no requirement in the Building Act to obtain any other permit before obtaining building approval. It is at the point of applying for the planning permission that the requirement to first make an application for the environmental permit then arises. If the claim, as it stood, was with respect to building approvals under the Building Act, it would have been misconceived and would not have been substantiated.

[114] Furthermore, if the claim is interpreted to mean a claim with regard to the building approval under the Building Act, counsel for the KSAMC would be correct in her submission that since there would have been no claim with regard to the planning permit under the TCPA, there was no jurisdiction to set aside the planning permit, as that issue was not before the court.

[115] The grounds regarding these issues would succeed.

[116] However, I have decided to treat the entire issue surrounding the "approvals" as one of semantics and assume that the respondents, as well as the learned judge, treated with the building and planning permit under the rubric of "building approvals". The learned judge's repeated references to the TCPA under which planning permission is granted, would suggest that this was the position, which would mean that the question as to whether the learned judge had any basis for quashing the planning permit would remain for determination. I will deal with that as a separate issue.

Issue 5 - Whether the planning and building approvals were illegal as a result of breaches of the 1966 Development Order and the 2017 Development Order - (grounds q and r of the KSAMC's appeal)

(i) Submissions

[117] Mrs Bennett Cooper pointed out that there is no mention of any development order in the Building Act and that, since the claim for judicial review sought no orders relating

to planning permission, the learned judge's finding that the building approval was illegal on the basis that KSAMC had failed to consider the 2017 Provisional Order was plainly wrong.

[118] Counsel submitted that, if this court, nonetheless, was of the view that planning permission was properly under review, the decision of the learned judge would still be wrong, as the KSAMC was under no duty to consider the 2017 Provisional Order, it not having been confirmed. Counsel argued that the 2017 Provisional Order could only be used for discussion purposes until confirmed. She pointed to the fact that section 10 of the TCPA speaks to confirmed orders only. Where a development order is confirmed, it is at that point that the provisional order becomes redundant, along with the previous confirmed order. The 2017 Provisional Order, she said, was not confirmed, and was to only have been used as a guide. Counsel pointed out that pursuant to section 5 to 8 of the TCPA, the 2017 Provisional Order would have been subject to objections and changes before being brought into force and confirmed by the relevant minister. Until confirmation, counsel argued, it was not possible for any development to be approved under the 2017 Provisional Order. Counsel admitted that the 1966 Confirmed Order did not contain the amendments proposed in the 2017 Provisional Order. However, she submitted, the 2017 Provisional Order had no legal binding effect and no authority was bound to follow it.

[119] Counsel also pointed to the fact that the complaint by the respondents was largely based on density, set-backs, plot area ratio, and habitable rooms, which were policies under the 2017 Provisional Order, as well as subsequent breaches by WAMH. However, counsel submitted, the 1966 Confirmed Order placed no restriction on those things. Counsel submitted, moreover, that at the time the building permit was granted, there was no breach of the 1966 Confirmed Order on the plan submitted by WAMH for approval.

[120] Counsel argued that there was no claim by the 1st to 10th respondents that the 1966 Confirmed Order was breached. The 1966 Confirmed Order, counsel submitted, did not speak to allowable habitable rooms per acre and is silent on that issue, leaving it to

the discretion of the local planning authority. The 1966 Confirmed Order only refers to density at the discretion of the planning authority and does not restrict planning on a density basis. The issue of habitable rooms, counsel said, only appears in the 2017 Provisional Order, which was not yet confirmed.

[121] Counsel admitted, however, that the authorities have looked at the 2017 Provisional Order and allowed it to act as a guide in the decision-making process. The 2017 Provisional Order speaks to residential zoning and density. The KSAMC, counsel submitted, may grant approval for a residential development in any residential area. Density allowance would be entirely within its discretion. Counsel pointed out that over the years the KSAMC has been granting approval for multifamily residences within the municipality and that the KSAMC only has the jurisdiction to grant approval in conformity with the 1966 Confirmed Order.

[122] Counsel also argued that an application for permission to develop land can only be made under sections 10 and 11 of the TCPA. Those sections counsel pointed out, speak to the requirement of the local planning authority to have regard to the confirmed order. Counsel pointed out that the draft 2014 and 2017 Provisional Orders have different considerations from the 1966 Confirmed Order, such as regarding density, plot ratio and set-backs.

[123] Counsel submitted further that the learned judge erred in her consideration of breaches of the 2017 Provisional Order. Counsel said that, in finding that the requirements for density in the 2017 Provisional Order were breached, and, therefore, that the approval was in breach, the learned judge erred, as, in making that finding, she would have treated the 2017 Provisional Order as if it were the Confirmed Order.

[124] Counsel conceded that WAMH's plan with respect to habitable rooms did exceed the requirements in the 2017 Provisional Order but argued that the 2017 Provisional Order did not take precedence over the 1966 Confirmed Order. Counsel maintained that the 2017 Provisional Order, in any event, did also give to the local authority a discretion

as regards density, taking into account future use of the neighbourhood and other considerations.

[125] Counsel also pointed to the fact that the breaches alleged by the respondents were about matters occurring after the permits had been granted, and were based on the draft 2017 Provisional Order. Counsel argued that, in so far as the learned judge had found that the KSAMC had failed to apply the 2017 Provisional Order, and went beyond what was allowable in that draft order, she was wrong.

[126] Counsel relied on section 11(1) of the TCPA and on the case of **Simpson v Edinburgh Corporation** (1960) SC 313, ('**Simpson's case**') to argue that the KSAMC was not bound to slavishly follow either the 1966 Confirmed Order or the 2017 Provisional Order when considering whether to grant planning permission. She submitted that the requirement in section 11(1) of the TCPA for the KSAMC to "have regard to the provisions of the development order" was discretionary, and did not require mandatory compliance, since section 11(1) also permitted the KSAMC to consider the order to the extent they were material, as well as "other material considerations". **Simpson's case** was followed in **Enfield LBC v Secretary of State for the Environment and another** [1975] 1 EGLR 124 ('**Enfield**'). Counsel argued that **Simpson's case** showed that even though primacy was given to the Development Order in Scottish law, the Authority was at liberty to depart from it, if other material considerations applied. Counsel submitted that, in this case, section 11(1) of the TCPA is in *pari materia* to the relevant Scottish provision, and therefore, the discretion remained that of the local planning authority, the KSAMC.

[127] As to what amounts to 'other material considerations' that the KSAMC may give regard to under the statute, counsel asked the court to consider the case of **Stringer v Minister of Housing and Local Government** [1970] 1 WLR 1281, which defines such 'other material considerations' as considerations of a planning nature relating to the use and development of land.

[128] Furthermore, counsel argued, the 1st to 10th respondents had made no claim before the learned judge that the permit was invalid, but rather, the allegation was that the KSAMC had failed to take appropriate enforcement measures in the face of alleged breaches. Counsel questioned how a failure to enforce could result in the invalidation of the grant of the permit.

[129] Mr Goffe, however, argued that there was no question that there had been numerous breaches of the 2017 Provisional Order. The 2017 Provisional Order, he said, calculates density with reference to size of the unit, and the development exceeded the allowable limit. He also complained that the plot area ratio in the 2017 Provisional Order was not met, which led to overdevelopment. Counsel pointed out that part of the building's setbacks was in breach of the 2017 Provisional Order, but was, nevertheless, approved without consultation with the affected neighbours. The only question, he said, was whether those breaches could be waived. He argued that the breaches could not have been waived by the KSAMC when they did not even know about them.

[130] The 1st to 10th respondents also relied on the authority of **Ashton Evelyn Pitt v The Attorney General of Jamaica & others** [2018] JMFC Full 7.

(ii) Analysis and disposal of issue 5 and the grounds related thereto

[131] I have already disposed of the issue regarding whether the building permit was issued *ultra vires* the Building Act, and I intend, as stated before, to treat, from now on, the reference to approval in the 1st to 10th respondents' case as a reference to a planning permit granted under the TCPA.

[132] Where a body has the discretion to grant permission to develop land, the exercise of that discretion can only be impeached if a wrong principle of law was applied, it acted unreasonably and or in breach of natural justice, as well as if the decision was in conflict with the development plan in force.

[133] I will now examine the relevant provisions of the statute under which the planning permit was granted to WAMH.

[134] The second schedule to the TCPA outlines the matters that are to be dealt with in a development order. Part I deals with roads, and Part II deals with buildings and other structures. The remaining parts, parts III to VII, deal with such matters as community planning, amenities, public services, transport and communications, and other miscellaneous matters.

[135] Section 5 of the TCPA deals with the preparation, confirmation and modification of development orders. Section 5(1) provides as follows:

> "5.-(1) The Authority may after consultation with any local authority concerned prepare so many or such provisional development orders as the Authority may consider necessary in relation to any land, in any urban or rural area, whether there are or are not buildings thereon, with the general object of controlling the development of the land comprised in the area to which the respective order applies, and with a view to securing proper sanitary conditions and conveniences and the co-ordination of roads and public services, protecting and extending the amenities, and conserving and developing the resources, of such area."

[136] Section 5(3) provides that, after a provisional development order is prepared, it should be gazetted with the information listed in the section. One such piece of information, as listed at section 5(3)(e), is that provision is made for objections to the provisional order as provided by section 6. Section 6 provides for objections to be made to the provisional order by any interested person. After the period given for objections has passed, and the Town and Country Planning Authority sends the provisional order and the objections to the Minister with its comments, the Minister may, if he is satisfied that the provisional development order is likely to be in the public interest, confirm it, with or without modification, by notification in the gazette to that effect. Thereafter, that provisional order becomes a confirmed development order (the combined effect of section 7(1) and (2)). A confirmed development order may also be amended by direction from

the Minister to the Town and Country Planning Authority to that effect, and the provisions of sections 5, 6 and 7 shall apply to any such amendments (section 8).

[137] Section 10(1) of the TCPA commences as follows:

> "10.-(1) Every confirmed development order (hereafter in this Act called a 'development order') shall…"

This means that all references to a development order in the TCPA is a reference to the confirmed order.

[138] At the time of the hearing of this case before the learned judge, the most recent confirmed order by virtue of these provisions was the 1966 Confirmed Order. The relevant development site is zoned for residential purposes under the 1966 Confirmed Order, was so zoned under the draft 2014 Provisional Development Order, and is still so zoned under the 2017 Provisional Order. There is, therefore, no breach in that regard.

[139] Section 11(1) 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 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**." (Emphasis added)

[140] The reference to "development order" in this section is a reference to a confirmed order. The breaches of the 2017 Provisional Order raised by the 1st to 10th respondents related habitable rooms, density and plot size ratio. The site of the development was less than ½ acre. The provisions in the 2017 Provisional Order relied on by the 1st to 10th respondents allowed for a limit of 50 habitable rooms per acre in that zone. They calculated that to mean 25 habitable rooms for ½ acre, and that based on the size of the site of the development (which was less than the ½ acre), the construction would have

exceeded the allowable habitable rooms by a total of five habitable rooms. That, they calculated to be 26% over the limit.

[141] Mr Leonard Francis, Town Planner and Director of the Spatial Planning Division of NEPA, gave affidavit evidence in this case. In his affidavit filed 30 November 2018, he deposed that one of his functions as Director of the Spatial Planning Division was to draft and publish provisional development orders, which are prepared pursuant to Part II of the TCPA. He deposed that the object of these orders, generally, is to control the development of land in urban and rural areas, with a view to securing, protecting and extending the amenities and the coordination of infrastructure, such as roads and other public services.

[142] His evidence was that the relevant development orders were the 1966 Confirmed Order and the 2017 Provisional Order. These documents, he said, guide land use for the parish, and at "all material times" NEPA and the NRCA adhered to their provisions. He pointed out that although a team, led by him, had drafted the 2017 Provisional Order, which was gazetted, it was not yet confirmed, and as such the 1966 Confirmed Order remained in effect. He also noted that Policy B H1 and B H2, relied on by the 1st to 10th respondents, are set out in the 2017 Provisional Order, which is used as a material consideration, but which was still going through the confirmation process.

[143] Mr Francis further deposed that it was not unusual for developments to be approved on lots less than the ½ acre, depending on factors such as the design of the development, availability of the necessary infrastructure, character of the area, and environmental controls.

[144] Policy B H1 provides as follows:

> "Multifamily development may be permitted on parcels of land which are 0.2 hectares (½ an acre) and over in area."

[145] Policy B H2 (b), which is the relevant policy to the area in which 17 Birdsucker Drive is zoned, deals with density and provides as follows:

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

[146] Policy B H4 deals with setbacks and provides as follows:

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

[147] Policy SP H31 suggests how density is to be approached, and states as follows:

> "The density of new development will be controlled in conjunction with other appropriate environmental controls, acceptable densities being determined by the character and actual density and zoning of adjoining sites and should be in accordance with criteria set out in Figure 1 and 7."

[148] Mr Francis also deposed that, when the 2017 Provisional Order was being prepared, the intention "with respect to Policy SP H31 and SP H32 [dealing with town house developments] 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".

[149] Mr Francis also pointed to the NEPA/NRCA's "Draft Guidelines for Variations in Densities and Parking Standard for Development Applications". That guideline allows for the acceptance of "variations up to 30% depending on the design, nature of the area, availability of infrastructure and other amenities". The proposed development, he deposed, was 26% over the allowable number of habitable rooms.

[150] Addressing the concern expressed in the NRCA Board meeting regarding the fact that density had been exceeded as a result of the excess of five habitable rooms in the development, Mr Francis deposed that variations in density was not unusual, and was

within the contemplation of the Development Order and the Guidelines. The development at 17 Birdsucker Drive, he said, was within the "framework" of the Development Order and the Guidelines.

[151] I have taken note that the 2017 Provisional Order itself uses discretionary language. Policy SP H30 states that "[new] buildings should conform **as far as possible** to those existing and the densities should protect the amenities of the surrounding areas" (emphasis added). Policy SP H33 provides that "[the] planning authority **will not normally** support proposals in areas where there is a deficiency in the requisite amenities and utilities" (emphasis added).

[152] On 8 May 2017, in Vol CXL No 36 of the Jamaica Gazette Supplement Proclamations, Rules and Regulations, the 2017 Provisional Order was gazetted as having been made. By virtue of section 24 of that order, and subject to section 25, the 1966 Confirmed Order was provisionally revoked. However, section 25 of the 2017 Provisional Order is a savings clause which saved any permission granted and not revoked under the 1966 Confirmed Order, before the 2017 Provisional Order came into operation. The 2017 Provisional Order could only come into operation after being confirmed by the relevant Minister. Therefore, at the time the permission was granted to WAMH, the operational order was the 1966 Confirmed Order. Under the TCPA the only purpose for the gazetted Order in 2017 was for discussion and for objections to be made to it by interested persons (see section 6 of the TCPA).

[153] Section 9 of the TCPA, in my view, underscores the point. It states as follows:

> "9.-(1) In the interval between the publication in the *Gazette* of a provisional development order and the confirmation of such an order pursuant to section 7 development in the area to which the provisional development order relates may proceed either pursuant to any law (other than this Act) relating to such development and to any authority granted under such law or without any such authority if there is no law (other than this Act) requiring any such authority but upon the understanding that-

(a) nothing in such authorization or in the preceding provisions of this section shall be construed to be permission to develop for the purposes of this Act or avoid any obligation to apply for permission to develop in conformity with the confirmed development order;

(b) all the provisions of this Act relating to permissions to develop, including in particular section 15, shall apply accordingly;

(c) If any development during the interval referred to above is found not to be in conformity with the confirmed development order that order shall prevail in respect of such development.

(2) The reference to development proceeding during the interval referred to in subsection (1) shall include development authorized or lawfully begun without authority prior to the commencement of such interval as well as development authorized or lawfully begun without authority during that interval."

[154] As a footnote, since the hearing of this appeal, the 2017 Provisional Order was confirmed by the Minister on 5 April 2023, with several modifications. One of the modifications was to Policy BH1, which now allows multifamily development on parcels of land which are ¼ acre and over. This serves to further underscore the point that the 2017 Provisional Order was merely a draft which was subject to changes and could not have been binding on any Authority until confirmed.

[155] The 1966 Confirmed Order is made under the TCPA. The general description of the Order states, amongst other things, that its intention is to make "provision for the orderly and progressive development of that portion of the Corporate Area of Kingston and St. Andrew as described in the First Schedule". In terms of zoning, it provides that the "use of the land will be guided by the zoning proposals of the Development Plan" (see pages 7 to 8 of the 1966 Confirmed Order).

[156] Clause 5 of the 1966 Confirmed Order states as follows:

"Subject to the provisions of this Order no development of land within the area to which this Order applies, shall take place

> except in accordance with the development plan and any planning permission granted in relation thereto:
>
> Provided that the planning authority may in such cases and subject to such conditions as may be specified by directions given by the Minister under this Order grant permission for development which does not appear to be provided for in this Order or the development plan, and is not in conflict therewith."

[157] On page 8 of the 1966 Confirmed Order, under the heading "*Buildings and other Structures*" it is stated as follows:

> "The provision and siting of community facilities, the layout of building areas, including density, spacing, grouping and orientation will be considered in dealing with applications to develop. The size, height, colour and finishing materials of buildings, the objects which may be affixed to buildings, the layout and site coverage of buildings, and the use to which land or buildings are to be put will all be subject to control by the local planning authority in order to improve standards of design and amenity."

[158] The KSAMC, therefore, has a wide discretion under this 1966 Confirmed Order, subject only to any directions by the relevant Minister, to grant permission to develop land, as long as the development is not in conflict with the Confirmed Development Order or the Development Plan for Kingston and St Andrew.

[159] The 2017 Provisional Order was drafted and gazetted, pursuant to section 5(3) of the TCPA, for objections to it to be received, and for consideration by the relevant Minister as to whether it should be confirmed in the interest of the public, with or without modifications, pursuant to section 7. Until that happened, it remained provisional. For the purposes of planning laws, in my view, whilst it remained provisional it had no binding effect. There is no provision in the TCPA for its use other than for objection purposes until it is confirmed. It is, for all intents and purposes, no different than a draft bill. By this, I am not to be taken to be saying that it could not have a place for consideration as a relevant material factor, like any other relevant material factor of a planning nature, especially since the entities said they considered it so, but I cannot see how it can be

binding. I am fortified in this view by the fact of the several modifications which were made to it prior to its confirmation in 2023, including to those sections or policies which the learned judge found were in their provisional state, binding on the KSAMC.

[160] Section 11 of the TCPA gives the local planning authority, which is considering an application to develop land the power to have regard to the confirmed order so far as it is material, and any other material considerations. Therefore, in the exercise of its discretion, in addition to considering the 1966 Confirmed Order, the KSAMC would have been entitled to have regard to other material considerations of a planning nature, including, I would suppose, the policies outlined in the 2017 Provisional Order, or even in a draft order, such as the 2014 draft. I make no findings in that regard, although I doubt that the 2014 draft, or even the 2017 Provisional Order, rises to the lofty heights of a policy document, the former having not been gazetted for discussion, and the latter, still being merely in a discussion paper phase. Be that as it may, I take the view that the KSAMC is not bound by any of the provisions in the 2017 Provisional Order, and it is certainly not bound by them over and above the provisions of the 1966 Confirmed Order.

[161] The learned judge was wrong to find that the KSAMC had no discretion in the matter and was bound by the unconfirmed 2017 Provisional Order, merely because it considered that order in determining whether or not to grant the planning permit. Certainly, the KSAMC could only consider relevant material in so far as it was not in conflict with the 1966 Confirmed Order, and in so far as it did not allow such considerations to divest it of its discretion, which it should and could lawfully exercise.

[162] One of the vexed issues that was placed before the learned judge, by the 1st to 10th respondents, in their challenge to the grant of the planning permit, was the question of habitable rooms. The question determined by the learned judge with regard to whether the planning permission had been granted in breach of the 1966 Confirmed Order and the 2017 Provisional Order, was whether the KSAMC had acted *ultra vires* when it permitted 26 habitable rooms to be constructed on the relevant property, with a lot size

of 0.38 acres, where the 2017 Provisional Order proscribes 50 habitable rooms per ½ acre. The answer to that question, in my view, must be "no".

[163] As earlier stated, based on section 10 of the TCPA, "development order" in the context of section 11 is a reference to a confirmed order, which for this purpose, was the 1966 Confirmed Order. Since the 1966 Confirmed Order does not speak to habitable rooms, that issue would be left to the discretion of the KSAMC, and, as this aspect of the 1st to 10th respondents' case is based on a breach of the allowable habitable rooms, there could be no breach of the 1966 Confirmed Order. *Certiorari* could not, therefore, lie on the basis that the plan approved by the KSAMC was approved in breach of the 1966 Confirmed Order, as there was no such breach shown (as the learned judge correctly found).

[164] The evidence from the KSAMC is that it does consider the 2017 Provisional Order, and even draft orders, as a guide to its planning decisions. In that respect, those orders could only be treated as "any other material considerations" as permitted by section 11 of the TCPA. In my view, however, the mere consideration of factors determined by those orders cannot bind the KSAMC to their provisions. Certainly, it would seem to me, and I could be wrong in this regard, the KSAMC could not bind itself to the provisions of a draft or provisional order in such a way as to divest itself of all discretion in the matter, as the respondents and, indeed, the learned judge, would have it.

[165] Although I do believe what I have said so far is sufficient to dispose of this issue, I will look briefly at the cases relied on by the KSAMC.

[166] In **Simpson's case**, the University of Edinburgh obtained planning permission for the construction of modern university buildings in George Square, Edinburgh, which involved the demolition of two sides of the Square, and the destruction of its characteristic Georgian appearance. An objection was raised by the owner of a residence on the Square, on the basis that the proposed development was contrary to the authority's development plan and was *ultra vires*. Lord Guest held that the local authority had the power to grant

planning permission contrary to the development plan. He pointed to section 12(1) of the Town and Country Planning (Scotland) Act, 1947, where, in so far as it is material to this issue, it states:

> "…and in dealing with any such application the local planning authority shall have regard to the provisions of the development plan, so far as material thereto, and to any other material considerations."

This part of that section is in *para materia* to section 11 of the TCPA.

[167] In interpreting the section in that case, Lord Guest said the following, at page 318:

> "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 other material considerations.' It was argued for the pursuer that this section required the planning authority to adhere strictly to the development plan. I do not so read this section. '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 oblige them to follow it. In view of the nature and purpose of a development plan…I should have been surprised to find an injunction on the planning authority to follow it implicitly, and I do not find anything in the Act to suggest that this was intended."

[168] Lord Guest was of the view that the words 'to have regard to' in the Act meant to 'have in view', and did not mean to 'follow implicitly'. Lord Guest was there dealing with the development plan, whereas, in this case, the learned judge was dealing with the provisional order, which could only have been treated as a material consideration. In this case, the KSAMC has said that it is not bound by the 2017 Provisional Order when making a decision, but that the order is only a material consideration.

[169] In **Enfield**, the London Borough of Enfield filed a motion for an order to quash a decision of the first respondent, the Secretary of State for the Environment, whereby on appeal from a deemed refusal of planning consent by the applicants, he granted outline planning permission to the second respondents, Fairview Estates (Enfield) Ltd, for the

residential development of 5½ acres of green-belt land. The motion was made on the basis that the first respondent had failed to have regard to the provisions of the relevant development plan, and that he wrongfully considered factors other than the provisions of the development plan. The applicable provisions, section 29(3)(a) and (4) of the Town and Country Planning Act 1971 (UK), make provision for the authority to take account of representations made to it before the end of the relevant period. Section 29, in part, states that:

> "…where an application is made to a local planning authority for planning permission, that authority, in dealing with the application, shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

[170] It was argued by the applicant that the provisions requiring the Minister to have regard to the development plan were mandatory, compelling the Minister to adhere inflexibly to its terms. The court considered and applied the reasoning in **Simpson's case** in disagreeing with that argument.

[171] In **Cala Homes (South) Limited v Secretary of State for Communities & Local Government and Anor** [2010] EWHC 3278 ('**Cala Homes**'), also cited by KSAMC, Mr Justice Lindblom applied the House of Lords decision in the Scottish case of **City of Edinburgh Council v Secretary of State for Scotland and Others** [1997] 1 WLR 1447 and held that, based on the relevant statutory provisions, the question whether or not to grant planning permission is to be determined in accordance with the development plan unless material considerations indicate otherwise. At para. 36, he stated what he referred to as the "well-established and familiar" legal principles governing "planning decision-making" as follows:

> "A local planning authority is required when determining an application for planning permission, to have regard to two types of consideration, namely the development plan so far as is relevant, and other considerations that are 'material' (section 70(2) of the Town and Country Planning Act 1990)…In England (as elsewhere in the United Kingdom) the planning system is still

> 'plan-led'. In statutory - as opposed to policy-terms, the priority to be given to the development plan in development control decision-making is encapsulated in section 38(6) of the 2004 Act. That section must be read together with section 70(2) of the 1990 Act. The effect of these two provisions, when they are read together, is that the determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise."

[172] The approach in **City of Edinburgh Council v Secretary of State for Scotland**, endorsed by Lindblom J, was to the effect that, if, on the one hand, the application was in keeping with the development plan and no material consideration indicted that it should be refused, the permit should be granted. On the other hand, if the application did not accord with the development plan, it should be refused, unless there were material considerations indicating that it ought to be granted (see speech of Lord Clyde at 1458E). Lord Clyde, in that case, reiterated that the priority to be given to the development plan was not "a mere mechanical preference to it" as there was some element of flexibility. It was for the local planning authority, he said, to recognise the priority to be given to the development plan, and to weigh all the material considerations.

[173] Although the question of what may properly be considered a "material consideration" is one of law within the purview of the courts, the matter of judgment in planning and what weight is to be given to each material consideration is squarely within the purview of the local planning authority. As Lindblom J said, at para. 36 of the judgment in **Cala Homes**, "so long as it does not lapse into perversity, a local planning authority is entitled to give a material consideration whatever weight it considers to be appropriate". Having considered the speech of Lord Hoffman in **Tesco Stores Ltd v Secretary of State for the Environment and Others** [1995] 1 WLR 759, Lindblom J concluded, at para. 36, as follows:

> "Thus, in appropriate circumstances, a local planning authority in the reasonable exercise of its discretion may give no significant weight or even no weight at all to a consideration material to its decision, provided that it has had regard to it."

[174] The relevant question that the learned judge, in this case, ought to have considered, is whether the KSAMC properly exercised the wide discretion which it had. In truth, there was no evidence led by the 1st to 10th respondents that it did not, other than to claim that the plans approved were in breach of the 2017 Provisional Order. I have already shown that the decision by the KSAMC was not in breach of any of the development orders, and in that sense, was not illegal.

[175] The remaining question then would be whether the decision to grant the permit was in any other sense illegal as being irrational or unreasonable in the "Wednesbury sense" (**Associated Provincial Picture Houses Limited v Wednesbury Corporation** [1948] 1 KB 223) in that the KSAMC took into account irrelevant matters, failed to take account of relevant matters and came to a decision that no reasonable authority could have come to. The answer to that depends, not on the legality of the 2017 Provisional Order, but whether, all things considered, the KSAMC properly exercised its wide discretion in granting the permit. It is clear to me that the decision whether or not to grant a planning permit should be left to the judgment of the decision maker, and that decision ought not to be disturbed unless it can be shown that the decision maker, in this case the KSAMC, acted with Wednesbury unreasonableness. (see the House of Lords decision in **Tesco Stores Ltd v Secretary of State for the Environment and Others**).

[176] In this regard, the vexed issues raised before the learned judge by the 1st to 10th respondents had to do with setbacks, density and plot area ratio. The complaint of the 1st to 10th respondents' regarding the plot area ratio was as regards the requirement by the 2017 Provisional Order for multifamily developments to be on not less than ½ acre. When NEPA's Urban and Regional Planner and Director of the Applications Management Division, Mr Gregory Bennett, conducted a site visit, he reported to the Board that the density and plot area ratio had been exceeded and that minimum setbacks had not been met. His conclusions, however, were based on requirements in the 2017 Provisional Order.

[177] In the affidavit of Shawn Martin, planning officer at the KSAMC, dated 13 August 2018, he deposed that the relevant guidelines and policies for development provided for a density of 50 habitable rooms in the zone in which WAMH's site is located. He said that WAMH's application was for an amendment to the previous approval, and that he properly assessed the application, taking into account the "relevant development order" and other material considerations. These, he deposed, included the fact that the application was not prejudicial to the environment, or to the amenity of residents, nor was it hazardous or injurious to public health or dangerous to the public. He also said that the "restrictions as to boundary setbacks and other conditions imposed consider the impact of lighting and airflow on neighbouring properties."

[178] The further evidence of Mr Martin was that the plot area ratio, which was the ratio of the entire square footage of the building against the square footage of the land, was deemed to be adequate, in keeping with industry practices, and therefore, permissible. Mr Martin also noted that WAMH's application had come with approvals from the fire department. He further explained that the left side setback, noted as partially satisfied in the affidavit of Gregory Bennett of NEPA, was located at the bedroom area for the units to the north western corner of the building on the second and third floors, featured a balcony and did not involve the majority of the building at that side. He said this would not affect the issue of privacy as it was an open balcony. He said further, that the right-side setback was to the north eastern side of the building which fronts 17 Birdsucker Drive, and the inadequacy there resulted from the curvature of the roadway where it met the land at that point. He said allowances had been made for that, since the road widens along the boundary to the recommended distance, as the gradient of the land fell towards the boundary. The National Works Agency had raised no objections to this, he said, and all other setbacks had been satisfied.

[179] The KSAMC, through affidavit evidence, set out for the court matters which were taken under consideration in giving planning approval. These were:

a. The character of the neighbourhood;

b. The presence of other multifamily developments in the area which were also three and four storeys;

c. The adequacy of infrastructure and utility services;

d. The provision of sewage facilities in excess of the requirements for the 12 units; and

e. The adequacy of the plot area ratio for that building design.

[180] No evidence was led, and no finding was made, that these were irrelevant considerations, that sufficient weight was not given to these considerations, or that there were other material considerations which ought to have been considered but were not so considered.

[181] Although the 1st to 10th respondents complained about privacy caused by the inadequacy of the setbacks, and the purported failure of the plan to conform to the requirements in the provisions of the 2017 Provisional Order, they provided no evidence to suggest that in granting the permit, the KSAMC acted unreasonably or irrationally.

[182] The court is concerned only with the manner in which the decision was made and not with the merits of it. The authorities cited by the parties all show that the law has drawn a clear distinction between what is a material consideration and the weight that should be given to it. The former is a question of law for the court, and the latter is one of weight and planning judgment for the local planning authority, in this case, the KSAMC. The learned judge was not entitled to substitute her own decision for that of the local planning authority. In the final analysis, the decision is that of the local planning authority.

[183] This ground would, therefore, succeed.

Issue 6 - whether section 11 (1A) of the TCPA is mandatory and therefore the grant of the planning permit was *ultra vires* (grounds j, l, m, n, o, p and bb of KSAMC's appeal and ground i of NEPA's and the NRCA's appeal)

(i) Submissions

[184] Mrs Bennett Cooper maintained that the learned judge held an erroneous understanding of the operation of the law, as there was no provision in the Building Act for the building authority to await or consider NEPA's permit. Environmental approval had no connection to building approval, counsel said.

[185] With respect to the TCPA, counsel submitted that the requirement in section 11(1A) for a developer to apply for and obtain an environmental permit from the NRCA (or an indication that one will be granted) before the grant of planning permission, is only directory and not mandatory, and therefore, non-compliance would not render null and void a permit which had been granted before the environmental permit.

[186] Counsel argued that in order to determine whether the section is mandatory or directory, the questions the court must ask are:

(i) "What is the scope, scheme, and purpose of the TCPA?

(ii) What is the importance of section 11(1)(A) of the TCPA? and,

(iii) What is the relationship between the general object of the Act, the requirement to first have the environmental permit, and the grant of the permit by the local planning authority"?

[187] Counsel submitted that the purpose of the TCPA was to ensure the orderly development of land in urban and rural areas and to ensure that the citizenry and the country's natural resources in that area, are protected. Counsel maintained that the environmental permit was important, as the NRCA had a duty to ensure the proper management, conservation and protection of the country's physical resources, and to prevent environmental injury. However, she argued that some of these considerations

also form part of the considerations for planning permission from the KSAMC. Counsel submitted that it is not necessary for the orderly development of land and the protection of the natural resources for the environmental permit to be granted first. Therefore, she said, the use of the word "shall" in section 11(1A) of the TCPA is not mandatory but merely directory. Furthermore, she said, the TCPA has no provision invalidating the planning permit if it is granted before the environmental permit.

[188] Counsel contended that, in any event, what was done by KSAMC was an amendment to the previous grant. She asserted that based on section 15(4), and sections 22(1) of the TCPA, the KSAMC was not obliged to ensure an environmental permit was in place before granting an amendment, as section 11 would not apply to a situation where an amendment was being sought. Furthermore, counsel argued, in a case where a developer sought an amendment to an existing permit, it was questionable whether, in considering whether to permit modification of the existing plan under section 22, the KSAMC had to consider whether the applicant requesting modification had an environmental permit as one would already have been granted with respect to the same land.

[189] Counsel argued further that it would follow logically, that since planning permission ran with the land, it could not have been the intention of Parliament that the KSAMC could not grant an amendment to an existing planning permit before the developer was granted his own environmental permit, especially in a case where an environmental permit had been previously granted in respect of the same land.

[190] Ms Hall, on behalf of NEPA and the NRCA, relied on the case of **Regina v Soneji and another** [2005] UKHL 49, to argue that the learned judge was wrong to apply a rigid and literal interpretation to the words "shall" in the statute and in holding that the section was mandatory.

[191] Mr Goffe, however, submitted that section 11(1A) of the TCPA was mandatory, and that in granting building approval before the environmental permit was in place, the

KSAMC had acted *ultra vires* the provisions. Therefore, it was submitted, the learned judge was correct to order *certiorari* to quash the permits.

[192] Mr Goffe argued further that, even though the representation made by the planning department of the KSAMC was that the application by WAMH was for an amendment, in his view, it was not an amendment but an entirely new application, and KSAMC was wrong to treat it as if it were.

(ii) Analysis and disposal of the grounds relating to issue 6

[193] Section 11(1A) of the TCPA is in the following terms:

> "(1A) Where the provisions of section 9 of the Natural Resources Conservation Authority Act apply in respect of a development which is the 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." (Emphasis added)

[194] The learned judge considered this section to be mandatory and binding on the KSAMC, NRCA and NEPA.

[195] It is clear to me that the learned judge fell into error when she found the NRCA and NEPA to be in breach of the TCPA. Neither the NRCA nor NEPA have jurisdiction over the KSAMC and they are not concerned with planning or planning permission. Neither are they governed by the TCPA. Their remit is to consider the provisions of the NRCAA, which govern their powers and duties. There is nothing in the NRCAA which requires NEPA or the NRCA to consider whether planning permission has been given in breach of the TCPA before granting a permit. In fact, the NRCAA explicitly advises applicants to apply for both permits at the same time. If the developer heeds that advice, and the KSAMC acts on the

application made to it first, before the NRCA acts on the one made to it, could the NRCA be held liable for the KSAMC's premature actions? The answer to that must be no.

[196] The finding that NEPA and the NRCA acted in breach of the TCPA in granting the environmental permit, therefore, is unsustainable. The grounds of appeal raised by NEPA and NRCA on this issue would succeed.

[197] As regards the findings with respect to the KSAMC, I would be prepared to agree that if the acquisition of an environmental permit was intended to be a condition precedent to the grant of planning permission, then any such grant before that condition precedent was satisfied would cause the planning permission to be void or voidable. However, I am not entirely convinced that that was the intention of Parliament.

[198] Although section 11(1A) of the TCPA requires an environmental permit to be applied for, and at most be granted before planning permission is granted, the section does not say that the planning permission will be invalidated if it is granted before the environmental permit.

[199] In June 2016, planning permission was granted to M & M for a multi-family residential development. Section 15(4) of the TCPA specifically indicates that planning permission runs with the land. When WAMH acquired the land, it did so with that permission in place. WAMH's application to the KSAMC in December 2017 was treated by the KSAMC as an amendment to the existing permit. An amendment was granted for permission to build 12 one-bedroom units in a single three-storey building. The change was from 12 studios to 12 one-bedroom units, with an additional floor.

[200] Although Mr Goffe argued that the language used in section 11(1A) is mandatory, it is not always the case that where a statutory provision uses imperative language, such as "shall", that it means the provision is mandatory so that non-compliance results in the steps taken being declared void or a nullity.

[201] The issue of whether a legislative provision is mandatory or directory has been the subject of several decisions. The earlier cases relied on the wording of the statute and whether it said a body "may" or "shall" do or not do a particular act. In **R v Soneji**, at para. 15, the House of Lords considered the approach of the courts to statutory interpretation of those statutes which contain provisions that may be considered either mandatory or directory. The Law Lords considered the fact that since the dictum of Lord Hailsham in **London & Clydeside Estates Ltd v Aberdeen District Council** [1980] 1 WLR 182 at 189E-190C, and in keeping with the authority of **Attorney General's Reference (No 3 of 1999)**, a more flexible approach has been adopted by the courts. That approach, the court said, focuses on the consequences of non-compliance, and poses the question whether, considering the consequences, Parliament intended the outcome to be total invalidity. The court, having examined cases in England, Canada and Australia, came to the conclusion that the rigid mandatory and directory distinction and "its many artificial refinements, have outlived their usefulness."

[202] The modern approach is to view the issue as one of legislative intent. The case of **Herbert Charles v The Judicial and Legal Services Commission and Anor** [2002] UKPC 34, considered the matter as one of intention. According to this more modern approach, whether a provision is mandatory is now a matter of intention, context and circumstances. See also **Portmore Citizens Advisory Council and Anor v Ministry of Transport and Works and Anor** JM 2005 SC 73 and **Member of Executive Council v The Bermuda Drug Co ltd** [1972] SC 27.

[203] In **Wang v Commissioner of Inland Revenue** [1995] 1 All ER 367, the Privy Council said that, in a case concerning the alleged failure to comply with a time provision, the terms mandatory and directory should be avoided. The Board said, at page 377, that a court should, instead, ask two questions: "(i) whether the legislature intended the person making the determination to comply with the time provision"; and if so (ii) "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?" In that case, the Privy Council found that the legislature had intended the Commissioner of Income Tax to act within a reasonable time. The legislature also imposed on him the duty to assess and collect taxes, and even if not done within a reasonable time, he was not deprived of his jurisdiction to make a determination, although he could be compelled to do so by *mandamus*. Therefore, a determination which was made by the commissioner would not be rendered null and void by reason only that it was not done within a reasonable time.

[204] **Coney v Choyce and others; Ludden v Choyce and others** [1975] 1 All ER 979 ('**Coney v Choyce**'), was a first instance decision of Templeman J, but a useful one. The case looked at the requirement for the publication of notices in respect of proposals to reorganize the Roman Catholic schools in neighbouring towns. Public notices were required under section 13(3) of the Education Act of 1944, and regulation 2 of the County and Voluntary Schools (Notices) Regulations 1968. It was held that the requirements were directory rather than mandatory, as the object of the requirements was to ensure the public became aware of the proposals and their right to object. Templeman J took the view that the object of the regulations, along with the consequences of finding otherwise, supported that position.

[205] Templeman J made reference to S A De Smith's Judicial Review of Administrative Action, 3rd edition 1973, pages 122 and 123, where it was stated that Parliament seldom indicates what the ramification of a failure to adhere to the provisions should be, and that "[t]he courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory...". If mandatory, disobedience will result in what has been done being declared void or voidable. If directory, disobedience will be treated as an irregularity which does not affect the validity of the action. The editors went on to state that:

> "Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. 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. Furthermore, much may depend upon the particular circumstances of the case in hand. Although 'nullification is the natural and usual consequence of disobedience', 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, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned."

[206] Lord Penzance in **Howard and Others v Bodington** (1877) 2 PD 203, at pages 210 to 211, said very early in the development of the law on this point, that in each case, the subject matter must be looked at, along with the importance of the provision that has been disregarded, relating the provision to the intended objective of the legislation, in order to determine whether it is imperative or directory only.

[207] In **Secretary of State for Trade and Industry v Langridge** [1991] Ch 402, the question of the effect of mandatory language in the provisions of a statute was considered by the English Court of Appeal. According to the head note, on 22 April 1987 a company was declared insolvent and an administrative receiver appointed. On 10 April 1989, the Secretary of State issued a notice of his intention to apply for a disqualification order against one of the directors of the company. That notice was served on the relevant director on 11 April 1989. On 21 April 1989, the Secretary of State applied by originating summons to have a disqualification order made against the director. The director applied to have the summons struck out for short service as being outside the statutory period for notice to be served. One of the issues before the court was the question whether the statutory notice period was mandatory.

[208] It was held that the purpose of the Company Directors Disqualification Act 1986 was to protect the public, and the object of the 10-day notice period requirement in the Act was to protect the person against whom an application for a disqualification order was being made. The court was conducting a balancing exercise in assessing the

relationship between the purpose and the objective of the legislation. The requirement for a 10-day prior notice provided a valuable safeguard but conferred only a limited advantage because of its brevity and the lack of requirement for particularization. The provisions were directory in nature and not mandatory, and non-compliance was a procedural irregularity which did not render the application by the Secretary of State void or voidable. That court also relied on the statement made by the editors in de Smith's Judicial review of Administrative Action, 4th edition (1980), at page 142.

[209] What the authorities show is that in assessing whether the provision should be treated as mandatory or directory only, consideration may be given to whether the particular provision affects any individual human rights, whether the right adversely affected is of great significance in terms of the value that normally attaches to it, and the importance of the procedural requirement to the administrative scheme set up by the statute.

[210] For my part, I would adopt the stance taken by Templeman J in **Coney v Choyce**. The TCPA is concerned with the procedure for the grant of planning permission for developments in keeping with the law, regulations, and the 1966 Confirmed Order for the Kingston Metropolitan area. The local planning authority has the jurisdiction to grant planning and building permits. It does not lose that jurisdiction because an environmental permit was not yet granted. Also, it would indeed be "lamentable", if in carrying out the purposes of the TCPA, the actions of the local planning authority would become so hampered so as to result in dire consequence for the unsuspecting applicant who would become subject to the "dire penalty" of having its permit voided with no chance of compliance. In my view, section 11(1A) merely sets out procedurally what is to take place, and is only directory, so that a failure to follow the procedure would not render a permit granted in those circumstances null and void. Both the object of the law and the consequences of non-compliance with the procedure in the section, suggests to me that this is what Parliament intended and is the correct approach for the court to take.

[211] Furthermore, in this particular case, an environmental assessment had already been done on the location and a permit granted to the original owner. There was no evidence that the plan submitted by WAMH created any possible environmental risk to the site or the surrounding community, which the previous plan by M & M, did not. Therefore, no substantial prejudice would have been suffered by the public or the country for which the benefit of the provision is intended.

[212] Taking the argument a bit further, what if M & M had commenced construction but sold the land whilst construction was unfinished? Would the developer who inadvertently completed the project without obtaining his own environmental permit need one, and if he does would he be unable to comply by later getting a permit? If he was not able to lawfully get an environmental permit in those circumstances, then what would be left is a project half of which had "underlying legal authority" and the other half not. Based on the learned judge's interpretation of the section, one half of the building could never be brought into compliance.

[213] I also considered the question of whether WAMH's application could properly be treated as an amendment to the existing permit by the KSAMC so that section 11 would not be applicable as submitted by counsel for the KSAMC. To find the answer, I had to look more closely at sections 15(4) and 22(1) of the TCPA.

[214] Section 15(4) of the TCPA, which falls under Part III of the TCPA, states as follows:

> "Where permission to develop land is granted under this Part, then, except as may be otherwise provided by the permission, the grant of permission shall enure for the benefit of the land and of all persons for the time being interested therein, but without prejudice to the provisions of Part V with respect to the revocation and modification of permission so granted."

[215] The practical effect of this section is that when WAMH bought the land from M & M it had permission to build on the land, that which M & M's approvals permitted it to build. This permission could be revoked or modified according to the provisions of Part V of the TCPA.

[216] Section 22(1), which falls under Part V, states as follows:

> "Subject to the provisions of this section, if it appears to the local planning authority that it is expedient, having regard to the provisions of the development order and to any other material considerations that any permission to develop land granted on an application made in that behalf under Part 111 should be revoked or modified, they may by order revoke or modify the permission to such extent as appears to them to be expedient as aforesaid."

[217] This means the planning authority has the power to revoke any permission granted for the development of land or they may modify it, if it appears expedient to do so, having regard to the development order and any other material consideration. That power to modify can be exercised at any time before the construction is completed.

[218] In my view, modification of the permit could include the consideration of an amendment to the original plans. It could also involve the addition of conditions to the permit. I do not accept that WAMH's application for a permit for development of the land had to be treated as a new application. One only had to consider the answer to the question of whether, had M & M decided to build one-bedroom units instead of studios after acquiring the planning permit, would it have to make a new application or apply for an amendment? I doubt a new application would have been necessary for M & M. It seems to me that since a planning permit was already in existence for the land, any permission to make changes to the plan could be treated as an amendment to that plan and the original permit. If M & M could apply to amend, then so could WAMH, as the permit enures to the benefit of the land and not the individual developer.

[219] Section 22 makes no reference to an environmental permit being in place before modification can be made. This is not surprising as modifications and amendments can be made at any stage, and the environmental permit is required before the commencement of the enterprise.

[220] The learned judge gave short shrift to any claim that an amendment was made to the existing permit under section 22, as that section requires the application for

amendment to be submitted to the Minister, and there was no evidence that that was done in this case. The learned judge was correct. There was no evidence that the procedure laid out in the section was carried out, but if it had been, in my view, the KSAMC's argument as regards the fact that section 11 would not have been applicable in the case of an amendment, would have more traction. I will, however, return to this issue later on in the judgment.

[221] These grounds have merit.

Issue 7 – whether the learned judge erred in holding that the grant of the environmental permit after the grant of a planning permit was *ultra vires* (grounds o, v, w, x and y of KSAMC and i, ii, iii, iv and v of NEPA and NRCA appeals)

(i) Submissions

[222] Counsel Ms Hall, for the NRCA and NEPA, contended that the issue of the "retroactive" grant of the environmental permit was never raised in the claim, and that the application against NEPA and the NRCA was for *certiorari* to quash the grant of the environmental permit on the grounds that the decision to grant it was made in bad faith and in breach of a legitimate expectation. There was also the claim that the environmental permit was illegal as it was granted in breach of the 1966 Confirmed Order and the 2017 Provisional Order. Counsel asserted that those were the issues raised in clear language, and those were the issues submitted on, with evidence tendered in support.

[223] Counsel also argued that the question that was raised by the respondents' claim was whether the KSAMC could grant the building permit without ensuring that the environmental permit was in place. The learned judge, however, of her own volition, went outside the ambit of the claim to consider and determine the question of whether granting the environmental permit, after the building approval had already been granted, was *ultra vires*, on the basis that there was no power to grant it "retroactively" to the planning permit.

[224] Counsel argued that there was a distinction between building approval being granted before an environmental permit, and the power to grant an environmental permit after development had commenced and that the learned judge fell into error in conflating the two. Counsel submitted that these being two separate and distinct issues, the learned judge ought, before concluding on the latter issue, to have asked counsel to submit on it.

[225] Counsel pointed to the fact that the respondents conceded that they had not raised any issue regarding the "retroactivity" of the grant of the environmental permit by the NRCA.

[226] Counsel noted that if submissions had been invited, it would have been pointed out that the NRCA did have the power to grant permits "retroactively". She pointed to sections 4 and 9 of the NRCAA, which sets out the powers and duties of the NRCA (section 4), and gives the NRCA the power to grant permits (section 9). Counsel contended that there is no time limitation in section 9 for the grant of such permits, and that Parliament could not have intended the NRCA to be unable to bring a builder in breach, into compliance. Such an interpretation counsel maintained, would be a fetter on the discretion given to the NRCA. Counsel asked the court to compare section 9(3) of the NRCAA with section 11 of the TCPA. Section 11, counsel contended, provides for applications to be made to the local planning authority and for such applications not to be granted unless an application is made for an environmental permit. Section 9 provides for the developer to apply for an environmental permit before commencing construction. The latter provision is aimed at the developer, and the failure of a developer to comply, counsel contended, did not divest the NRCA of its jurisdiction. Counsel submitted that the judge's discussion surrounded section 9(3), but her conclusion, at para. [243] of her judgment, did not follow from her discussion.

[227] The issue counsel argued, was one of statutory interpretation, and the conclusion the learned judge drew was not in keeping with the issues raised or the proper interpretation of the guiding statute. Counsel submitted that it was inimical to

Parliament's intention and the purpose of the legislation for the environmental permit to be held invalid because it was issued after construction commenced. This, in circumstances, she said, where, if the statutory provisions are breached, there are enforcement procedures available and provisions to remedy the breach. Counsel maintained that the legislative scheme under which NEPA and the NRCA acted did give them the power to remedy any breach of section 9(3) by taking the lawful steps to bring the development into compliance with the provisions of the NRCAA. Counsel cited section 9(7), which makes it an offence to breach section 9(3). Section 13, she pointed out, is the enforcement section. Counsel argued that the learned judge failed to give sufficient regard to these sections.

[228] Counsel submitted that it was inconceivable that Parliament could have intended that the NRCA and NEPA have no discretion to remedy a breach, and that such an interpretation was against good administration and public policy.

[229] Counsel further submitted that the learned judge erred in applying a literal interpretation of the provisions rather than a purposive one in order to avoid the resulting absurdity created by her ruling. The purpose of the legislation, counsel submitted, was to ensure effective and sound construction, whilst ensuring the environment is protected. This, counsel maintained, is not achieved by causing construction in breach of the law to be permanently halted and destroyed, and to have the process for applying for a permit begin anew, especially where no environmental injury is present or imminent.

[230] Counsel Mrs Bennet-Cooper also made submissions on this issue on behalf of the KSAMC. Counsel contended that the finding of the learned judge that the grant of the environmental permit after the grant of building approval invalidated the former, was an erroneous one, as there was no connection between the two powers under the two separate pieces of legislation, and the exercise of one power under one Act, could not invalidate the exercise of the other.

[231] Counsel argued that, in any event, as far as the powers of the KSAMC were concerned, even if WAMH had intended to build what M & M had permission to build, they would still have had to seek an environmental permit, as the evidence before the learned judge was that the environmental permit did not run with the land and was personal to the particular developer. In such a case, the environmental permit would, of necessity, be granted after the planning permit, that is, "retroactively" to the planning permit. There was no argument below from the respondent, counsel maintained, that the implication of this was that WAMH would have had to seek an environmental permit then apply for a new planning permit to build what M & M already had the permit to build.

[232] Mr Goffe, for his part, indicated that the 1st to 10th respondents would not be pursuing any argument before this court regarding the validity of a "retroactive" grant of the environmental permit issued by NEPA and the NRCA. This, he said, was because that had not been their case nor had it been their concern. The case and the concern of the respondents was that the decision to grant the environmental permit was made without giving the 1st to 10th respondents the hearing that they had been promised, prior to the meeting of the NRCA to consider whether to grant the environmental permit.

(ii) Disposal of issue 7 and the grounds in relation thereto

[233] It is beyond dispute that the "retroactive" grant of the environmental permit was not an issue joined between the parties. The 1st to 10th respondents did not raise it before the learned judge, neither in their fixed date claim, nor in their submissions. The issue was one raised and determined entirely by the learned judge of her own volition. I do not doubt the learned judge's power to raise the issue of her own volition, which is one of law, however, I do agree that it was incumbent on her, in the circumstances, to invite the submissions of counsel before coming to a determination on the point.

[234] Since the 1st to 10th respondents have maintained that the learned judge was, nevertheless, correct in her determination, I will examine the issue to determine if they are correct in this view.

[235] Section 3 of the NRCAA provides for the establishment of the NRCA. By virtue of section 2, all references in the NRCAA to "the Authority" is a reference to the NRCA so established. Section 4 sets out its duties and functions, which are wide and encompassing as it relates to the protection of the environment. The requirement for an environmental permit for enterprises, developments and construction is provided for in section 9 of the NRCAA. It is necessary to set out the provisions of section 9(1) to 9 (6). They provide as follows:

> "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) Where a permit is required under subsection (2) and any activity connected with the enterprise, construction or development will or is likely to result in the discharge of effluents, then, application for such permit shall be accompanied by an application for a licence to discharge effluents as required under section 12.
>
> (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.**

(6) The Authority may-

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

(b) refuse to grant a permit,

and where the Authority refuses to grant a licence it shall state in writing the reasons for its decision and inform the applicant of his right under section 35 to appeal against decision." (Emphasis added)

[236] The restriction in the NRCAA on the grant of environmental permits by the NRCA, therefore, is to be found in the proviso to section 9(5), which provides that the permit shall not be granted if the Authority is satisfied that "any activity connected with the enterprise, construction, or development" is likely to be injurious to public health or any of the country's natural resources.

[237] Section 9(7) states:

"(7) Any person who contravenes any provisions of subsection (2) shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding fifty thousand dollars or to imprisonment for a term not exceeding two years or to both such fine and imprisonment, and –

(a) where a person defaults in the payment of a fine imposed under this subsection, he shall be liable to imprisonment for a term not exceeding one year; and

(b) where the offence is a continuing offence, he shall be liable to a further fine not exceeding three thousand dollars for each day on which the offence continues after conviction."

[238] Section 9(7), therefore, makes it a criminal offence to contravene any of the provisions in section 9(2).

[239] As can be seen the prohibition on the commencement of construction without an environmental permit is set out in section 9(2) of the NRCAA, and the provisions in section 9 provide what is to happen in the event of a breach or non-compliance with these stipulations.

[240] Section 13 provides:

"13.–(1) Without prejudice to the provisions of section 9(7), 10(4), 11 and 12(3) –

(a) **where a person fails to comply with the provisions of section 9(2)**; or

(b) where the person responsible fails to submit an environmental impact assessment within the time specified by the Authority; or

(c) where a person fails to comply with the provisions of section 12(1),

the Authority may issue an order in writing to such person directing him to cease, by such date as shall be specified in the order, the activity in respect of which the permit, licence or environmental impact assessment, as the case may be, is required.

(2) Where the person to whom an order is issued under subsection (1), fails to comply with the order, the Minister may take such steps as he considers appropriate to ensure the cessation of the activity to which the order relates.

(3) Where authorized by the Minister acting pursuant to subsection (2), a member of the Jamaica Constabulary Force may use such force as may be necessary for the purpose of ensuring compliance with an order referred to in that subsection; and any

> person who hinders or obstructs any such member acting as aforesaid shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding one year." (Emphasis added)

[241] A failure to comply with section 9(2) may result in a cessation order of the activity for which the permit is required. The section does not state that non-compliance will result in the person in default being barred from applying for another permit.

[242] Section 31 stipulates that:

> "31. The grant of a permit or a licence under this Act does not dispense with the necessity of obtaining planning permission when such permission is required under the Town and Country Planning Act, and in such circumstances, an application under that Act for planning permission in respect of any development which, pursuant to an order under section 9(1), is of a prescribed description or category shall be made thereunder simultaneously with the making of an application for a permit or licence under this Act."

[243] It is clear that the language of section 31, even though it uses the word "shall", is directory only. There is no suggestion that a failure to apply for both permits simultaneously would invalidate either permit.

[244] An appeal from the decision of the NRCA in relation to a permit or licence, lies to the relevant minister by virtue of section 35, and the Minister has the right to (a) dismiss the appeal and confirm the decision; (b) allow the appeal and set aside the decision, (c) vary the decision; or (d) allow the appeal and direct that the matter be determined afresh by the NRCA. The section also provides that the Minister's decision is final. Section 43 is also relevant, and will be referred to later.

[245] Section 15(1) and (2) of the TCPA provides for the retroactive grant of planning permission, and section 15(4) provides for planning permits to run with the land. The effect of subsections (1) and (2) is that planning permission can be granted even if the work began without such permission first being in place. There is no equivalent provision

to sections 15(1), 15(2) or 15(4) of the TCPA in the NRCAA with regard to an environmental permit. However, the NRCAA itself does not require any particular permission to be acquired first and is not concerned with the provisions of any other Act. It simply requires an environmental permit to be acquired before construction commences.

[246] The learned judge found that section 9(2), in conjunction with section 9(3), meant that WAMH could not lawfully be granted the environmental permit after the planning permit, and that such a grant was a breach of both section 11 of the TCPA and section 9(3) of the NRCAA. By doing so, in my view, the learned judge placed the ramifications of the unlawful conduct of the developer on the NRCA, in circumstances where the relevant statute, the NRCAA, provides for the punishment of the developer who so acts unlawfully.

[247] The 1st to 10th respondents have not sought to support the learned judge's findings in this regard, it not being their case at all. However, the appellants' argument that the learned judge's finding was wrong, and that she fell into error on two grounds, I find to be unassailable. Firstly, I agree with the argument that the learned judge ought not to have made such a finding which disposed of the case in the 1st to 10th respondents' favour, when it was not part of the claim filed, and had not been argued or ventilated before her. It deprived the appellants of the opportunity to submit on such a fundamental issue which was decided against them, to their detriment.

[248] The NRCA and NEPA say that if they had been allowed, they would have brought the learned judge's attention to the Natural Resources (Prescribed Areas) (Prohibition of Categories of Enterprise, Construction and Development) Order, 1996, and the Natural Resources (Prescribed Areas) (Prohibition of Categories of Enterprise, Construction and Development) (Amendment) Order, 2015, made under section 9(1) of the NRCAA. The former prescribes the requirement for a permit to conduct certain categories of enterprise, unless it was previously in existence before the prescribed date. The latter amended the former to include a requirement for the application for a permit within one

year of the date of the amendment where the construction or enterprise pre-dated the Order. Therefore, those falling within the specified categories since the Order came into being are allowed 12 months from the date of the Order within which to apply for a permit and continue operation, or cease to lawfully operate after the 12 months has expired. There is also the Natural Resources Conservation (Permits and licences) Regulations, 1996, and the Natural Resources Conservation (Permits and licences) (Amendment) Regulations, 2015, which prescribes how permits are to be applied for and allows for renewal of permits within the prescribed time periods, as well as for modification of permits. By virtue of section 7 of the 1996 Regulations, a permit granted under the Regulations is not transferable. By virtue of regulation 7A of the 2015 amendment, the permit is valid for five years. By regulation 7D, the NRCA may modify or vary the terms of the permit if there are material changes in circumstances since the permit was first granted. Clause 16, in the permit, indicates that the Authority is to be notified of a change of ownership in the permittee.

[249] In truth, none of these regulations specifically address the issue in this case so as to assist the appellants.

[250] However, I agree with Ms Hall that it makes for good sense, good order and good governance for those who are non-compliant with laws and regulations requiring permits and licences to be allowed to bring themselves into compliance. It is the hallmark of a modern functioning society. Take for instance the individual found driving his motor car without a licence or registration certificate as required by law; such a person will be prosecuted as provided by said law and the motor vehicle may be seized, but in such cases, the relevant authorities would not be acting *ultra vires* if such persons are, thereafter, granted drivers licences and registration certificates. The relevant legislation provides that no person shall operate a motor vehicle on a road unless the motor vehicle is registered to do so, and no person shall drive a motorcar without a driver's licence. Can we then say, because the car was first driven without these legal requirements, the

situation cannot be remedied, and the individual in breach brought into compliance? I think not.

[251] I, therefore, also agree with the second ground that the learned judge's finding that the NRCA and NEPA could not grant an environmental permit after the planning permit was wrong, as there was nothing in the NRCAA to prevent them from doing so.

[252] The learned judge's interpretation of the provisions of the NRCAA placed a fetter on the discretion of the NRCA to grant an environmental permit as it saw fit, as it is permitted to do under the NRCAA. Section 9(2) is a prohibition section in that it prohibits the commencement of an enterprise, construction or development without an environmental permit. The penalty for that is provided under subsection 7. Subsection (3) is the permission section, and at the very least, it provides that an application be made for a permit before commencement of the enterprise. The section does not state that no permit will be granted if the enterprise or construction had commenced before the application is made.

[253] Section 43 of the NRCAA is a transitional section that authorises the retroactive application for the grant of a permit by a person responsible for any enterprise, construction, or development, which began in an area before an Order under section 9(1) making that area a prescribed area, came into effect. The Natural Resources (Prescribed Area) (Prohibition of Categories of Enterprise, Construction and Development (Amendment) Order, 2015, provides that, where a permit was not required for an enterprise, construction or development before 1 April 2015, and the undertaking began before that date, a permit shall be applied for within a year of that date, during which period the undertaking may continue. The undertaking cannot lawfully continue after that date, if no permit is applied for. This demonstrates that the emphasis in the law is on compliance and that the grant of a permit after the commencement of activities is not an unknown concept in the NRCAA.

[254] I cannot agree that there is any proper basis in law or policy for the learned judge to have imposed such a fetter on the discretion of the NRCA to grant an environmental permit to a developer wishing to comply with the statute after a breach. This is especially so, where the NRCAA provides for the punishment that may be meted out to such a developer if they breach the provisions. Furthermore, section 9 of the NRCAA makes no reference to section 11 of the TCPA, or to the TCPA at all.

[255] An examination of the application for the permit, the permit itself, and the cessation order issued under the NRCAA, shows that all three contemplate the possibility of retroactive compliance. In my view, they show that consideration has been given to the fact that an enterprise could be unlawfully started before the environmental permit was granted, but that later compliance is possible.

[256] The site warning notice issued against WAMH on 27 April 2018, requested that it "kindly take immediate steps to: [a]ddress the above breach". It then indicated that the remedy is to "[c]ease the construction activities with immediate effect and apply for an environmental permit or bring the development in compliance with the above-mentioned condition". The consequence of the failure to comply is listed as legal action. That is in conformity with the provisions of the NRCAA itself.

[257] Although counsel Mrs Bennett-Cooper made a good point regarding the fact that the planning permit ran with the land, and therefore, inevitably in such a case, the environmental permit would be acquired after the planning permit, this does not answer the requirement of the NRCAA. The NRCAA does not require the grant of an environmental permit before the issuance of a planning permit. What it requires is an environmental permit before the construction commences. So, it is technically possible to have a planning permit in place before an environmental permit, but still satisfy section 9(3) of the NRCAA by obtaining an environmental permit before construction commences. Thus, there is a disconnect between section 15(4) and section 11(3) of the TCPA, and section 9(3) of the NRCAA. This disconnect can be easily demonstrated. Since construction cannot lawfully commence without the planning and building permit, the

environmental permit would necessarily have to come before the planning permit in the case of a property that has never had a planning permit. However, for a property which already has a permit in place running with the land, the environmental permit to a new permittee would naturally come after the planning permit, but before construction commences.

[258] When one considers the interplay between sections 11 and 15 of the TCPA and section 9 of the NRCAA, the learned judge's reading of section 11 of the TCPA and section 9 of the NRCAA, together, and her interpretation of the combined effect of those provisions, would result in section 15 being otiose. So, for instance, if her interpretation were to be accepted, it would mean that, in the case of a development which was started without an environmental permit or planning and building permission, planning and building permission could be granted retroactively under section 15 of the TCPA. However, because the enterprise was commenced before the environmental permit was issued, the development would never be able to get an environmental permit under section 9 of the NRCAA, and because it could not get an environmental permit the retroactive grant of the planning permit would be rendered unlawful because the developer did not first get an environmental permit. The law then becomes a circuitous impossibility. That could never have been the intention of Parliament. Worse yet, taking the learned judge's interpretation to the extreme, it would also mean that, where land is passed on with a planning permit running with it, and where work has already been commenced by the original permittee who had an environmental permit, the new owner would not be able to acquire an environmental permit because the original owner had already commenced construction.

[259] Unless the statute expressly prohibits the NRCA from granting an environmental permit to a person in breach in order to bring him or her into compliance, I see no reason to read such a provision into the law. This is especially so where the sanction for the developer who fails to comply is already set out in the NRCAA. Section 13 of the NRCAA

provides for the prosecution of the offender, but it does not provide for the barring of the grant of a permit thereafter.

[260] Furthermore, the imperative in the NRCAA is aimed at the applicant and not at the NRCA granting the environmental permit. This is an essential difference from the TCPA. The NRCAA does not restrict the NRCA from granting a permit where section 11 of the TCPA applies, instead, it mandates the person undertaking an enterprise or development to first obtain a permit before commencing construction or face prosecution. The requirements for compliance in section 9 of the NRCAA are not directed at the decision-maker. The question I would ask, therefore, is whether Parliament intended the failure of the developer to comply with the provision to apply for an environmental permit before commencing construction, to have the effect of depriving the NRCA of its jurisdiction to grant the permit after compliance. In my view, the answer must be no, for the requirements and the consequences of failing to follow them are quite clear and are aimed at the applicant.

[261] Based on the objectives of the statute, I have also considered, what would be the likely consequences of granting an environmental permit after a planning permit? If there is, or is likely to be, a negative public health and/ or environmental impact, then the permit will not be granted unless the negative impact can be mitigated. If there has been no negative impact on public health and/or the environment and there is unlikely to be, then all other considerations being equal, it seems to me that there would be no reason not to grant a permit, as the refusal of a grant is not one of the sanctions provided for in the NRCAA for a breach of section 9. Based on the objective of the NRCAA, which is to protect the environment and the natural resources of the country, there seems to be no good policy reason for the NRCA to be divested of its jurisdiction, and it appears to me to be an unnecessary fetter on the power to discharge such an important public duty.

[262] Applying that same reasoning, it is clear that it was the intention of Parliament that no construction or enterprise should detrimentally affect the environment or public health. To ensure that this does not happen, it provides that the entities in charge of the

protection of the environment should grant a permit to conduct the enterprise or construction, which would signify that the said enterprise or construction will not detrimentally affect the environment. Therefore, although the developer must have a permit which would so signify, in my view, section 9(3) is directory as to the time at which the permit must be applied for and the learned judge was in error on this issue.

These grounds would succeed.

Issue 8 - Whether the learned judge was wrong to grant orders of *certiorari* against NEPA (grounds b, dd, ee, ff, gg of KSAMC's appeal and grounds ii, vi and vii of NEPA's and NRCA's appeals)

(i) The submissions

[263] Ms Hall argued that NEPA and the NRCA did not act unlawfully or unreasonably in granting the environmental permit, and, as recognised by the learned judge, had taken account of the relevant factors. Although NEPA and the NRCA had considered density and setbacks in the context of the 2017 Provisional Order, she said, they concluded that the permit could be granted with conditions. They, therefore, did not act *ultra vires* in that respect, and *certiorari* ought not to have been granted.

[264] Counsel Mr Goffe argued that the NRCA had ignored the breaches made by WAMH when it granted the environmental permit, having taken the position that it was a planning issue. Counsel contended, however, that even though NEPA and the NRCA had been wrong to take that stance, the 1st to 10th respondents had not challenged that decision. Their challenge, he said, was to the right to be heard as had been promised, which was breached.

[265] Counsel, however, argued in support of the learned judges' decision to grant *certiorari* on the basis that the learned judge was correct in her interpretation of the law, particularly that the NRCA and NEPA should have been approached first for an environmental permit before WAMH went to the KSAMC for the planning permit. Counsel argued that based on the legislation, the NRCA must grant an environmental permit before the KSAMC can grant approval.

(iii) Analysis and disposal of issue 8 and the grounds relating thereto

[266] *Certiorari* is a discretionary remedy. The court is loath to interfere with the proper exercise of a judge's discretion to grant such a remedy. *Certiorari* is usually granted where a public body acts: (a) *ultra vires* its powers and/or outside its jurisdiction, (b) unreasonable in the Wednesbury sense, (c) in breach of natural justice, or (d) in some manner which is an abuse of power. The court's power is one of review of the decision and not one of a primary decision - maker. Judicial review involves a review of the manner in which the decision was taken, it does not determine the merits of the case. It also involves an examination of the legality of the procedure by which the decision was reached, and questions may be asked as to whether the public body was permitted to make the decision it did, in the manner it did. If the decision is not reached properly and legally it may be declared a nullity, and *certiorari* may be granted to quash it.

[267] Although judicial review was brought against NEPA, it is not an incorporated body, nor is it a statutory body. It is an executive agency set up to provide technical and administrative support to the NRCA, and as such, it made no decision with respect to the grant of the environmental permit. The permit was granted by the NRCA. Since NEPA made no decision regarding the permit, as the Full Court found in **Ashton Evelyn Pitt v The Attorney General of Jamaica**, it could not "be the subject of an order for *certiorari*, a declaration, or an injunction in relation to the decision concerning the permits" (see para. [75] of that case). The learned judge, in this case, recognised this fact but, nevertheless, erroneously made the order of *certiorari* against NEPA.

[268] I must also indicate that although the learned judge's order for *certiorari* was made against NEPA, her judgment addressed both NEPA and the NRCA, sometimes as one entity and at other times treating NEPA as an agent of the NRCA. Surprisingly, none of the parties made an issue of this fact, and the NRCA, in filing this appeal along with NEPA, seemingly accepted that the order of *certiorari* ought to have been made against it and not NEPA. I will do likewise, as based on my decision, it would make no difference to the outcome of the appeal.

[269] I have already determined that the learned judge was wrong to conclude that the NRCA acted *ultra vires* in breach of the NRCAA, and that the environmental permit could not be granted after the planning and building permit had been granted. The remaining question is whether there was any other basis for an order of *certiorari* with respect to the decision to issue an environmental permit to WAHM.

[270] Mr Gregory Bennett of NEPA, in his affidavit filed 30 November 2018, said that, having received WAMH's applications, they were processed for review and circulated to the relevant agencies, such as the NWA's Environmental Health Unit and the Water Resource Authority, for their review and comments. The applications were also assigned for technical review and site inspection. The technical review, he said, showed that a previous permit had been granted to M & M for the same site, and that planning and building permission had already been granted to WAMH. He also said that, on review of the applications, potential impacts were identified along with the appropriate mitigating measures. Part of the technical review, he said, was the identification of physical planning aspects of the development, such as density, setbacks, amenities, landscaping, plot area ratio, access, drainage, and parking, as prescribed by the development standards and policies contained in the 1966 Confirmed Order and the 2017 Provisional Order, as well as a development investment manual. The finding was that there was "partial satisfaction".

[271] The issues of density, setbacks and plot ratio, which were considered by the NRCA were as a result of the policies set out in the 2017 Provisional Order.

[272] The findings were tabled at NEPA's internal review committee meeting, and the applications were referred to the NRCA for consideration with three options, one of which was the outright refusal of a permit due to the partial inadequacies with density and setbacks. The minutes of the meeting of the NRCA held on 15 May 2018 recorded the consideration of WAMH's applications for the environmental permit and environmental licences. It is recorded there that a concern was raised as regards the fact that the density had been exceeded by five habitable rooms. There had also been a concern that the

KSAMC had already approved the plan. The discussion surrounded the requirement for a meeting with KSAMC, which, it was said, had approved an amendment to a plan for which an environmental permit had been in place. At the time of that earlier approval, the area was zoned for 30 habitable rooms per acre. It was noted that the KSAMC had approved a three-storey building of 12 one-bedroom units, which was an amendment to the original plan approved. The minutes also recorded the receipt of objections to the development. There was, thereafter, an agreement to grant the permit on conditions.

[273] The NRCA made the decision to grant the environmental permit, which would have been an indication that the NRCA was of the view that "the activity subject to all the conditions stipulated in this Permit [was] not likely to be injurious to public health or the environment".

[274] Having given due consideration to the issues arising on the application, and to the core issue of the effect of the enterprise on the environment, the NRCA could not be said to have acted unreasonably or irrationally in granting the environmental permit. Indeed, the learned judge did not find that the NRCA had acted unreasonably or irrationally.

[275] The NRCA having not acted *ultra vires,* and the learned judge, having found that it had not acted unreasonably or irrationally, I can only conclude that she erred in granting the order of *certiorari* with respect to the decision to grant WAHM an environmental permit.

[276] The appellants would also succeed on these grounds.

Issue 9 - whether the KSAMC was in breach of its duty in failing to refer WAMH'S application to the Town and Country Planning Authority (grounds cc and bb of KSAMC's appeal)

(1) Submissions

[277] Mrs Bennett Cooper submitted that the KSAMC was under no obligation to refer WAMH's application to the Town and Country Planning Authority. Counsel relied on the

provisions in section 12(1) and section 12(1A) of the TCPA, which she said were clear in that regard.

[278] Mr Goffe, however, argued that the KSAMC was in breach of its obligation to refer the matter to the Town and Country Planning Authority because the plan submitted by WAMH was not in conformity with the 2017 Provisional Order.

(2) Disposal of issue 9

[279] The obligation to refer to the Town and Country Planning Authority is to be found in the provisions of section 12 of the TCPA. Section 12(1) and (1A) provides as follows:

> "12. -(1) The Authority may give directions to any local planning authority or, to local planning authorities generally requiring that any application for permission to develop land, or all such applications of any class specified in the directions, shall be referred to the Authority instead of being dealt with by the local planning authority, and any such application shall be so referred accordingly.
>
> (1A) 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."

[280] This is the section on which the learned judge relied to conclude that the KSAMC was in breach of its statutory duty to refer WAMH's application to the Town and Country Planning Authority. The learned judge made her determination on the basis that WAMH was in breach of the 2017 Provisional Order and, therefore, pursuant to section 12(1A), the KSAMC ought to have referred the matter to the Town and Country Planning Authority. However, in this regard, she fell into serious error, for the reference in the section to conformity with the Development Order must be read as a reference to a confirmed order. A confirmed order is the only order recognised by the relevant legislation as the development order. In the circumstances, where no breach of the 1966 Confirmed Order was alleged or proved, the learned judge had no basis on which to ground a finding

that the KSAMC had been duty bound to refer WAMH's application to the Town and Country Planning Authority by virtue of section 12(1A).

[281] The appellants would succeed on the grounds relating to this issue.

Issue 10 - whether the learned judge's findings of fact were against the weight of the evidence (grounds, s, t and u of KSAMC's appeal)

Discussion

[282] In order to properly exercise her discretion to grant the remedies sought, the learned judge had to consider the facts adduced by the 1st to 10th respondents in support of the claim. For the respondents to have succeeded, those facts had to show that the KSAMC made decisions in circumstances that fall in one of the accepted grounds of judicial review. There had to have been proof of the decisions made, and proof that they were made in at least one or more of the following circumstances:

a) *ultra vires*;

b) with procedural impropriety;

c) unreasonably in the Wednesbury sense;

d) irrationally; or

e) in breach of the principles of natural justice.

[283] Where an authority has the power to act, as it thinks fit, or with expediency, it must do so on reasonable grounds. Where it has a duty to act and fails to do so, it must have good reason for not so doing. To determine if any such circumstance subsisted, there must be facts which can support such findings. The learned judge was required to consider the admitted or proved facts disclosed in the record, the wide discretion given to the authorities under review, the conduct of those authorities in relation to those facts, and the legislation under which they purported to act or failed to act.

[284] The 1st to 10th respondents' contentions before the learned judge may be summarised, as per the affidavits filed in support of the claim, and in their written submissions filed 23 March 2021, as follows:

i) The KSAMC failed to take account of the 2017 Provisional Order;

ii) The KSAMC should not have treated WAMH's application as an amendment since the statutory regime had changed between 2016 and 2017;

iii) Building approval ought not to have been granted by the KSAMC as there were numerous breaches of the 2017 Provisional Order which were not brought to the attention of the KSAMC; including:

(a) no multifamily development is to be allowed on less than ½ acre;

(b) maximum density of 50 habitable rooms per acre was exceeded when KSAMC approved 26 habitable rooms on a lot smaller than a ½ acre;

(c) Policy SPH30 of the 2017 Provisional Order was breached in terms of density.

iv) No environmental permit was applied for prior to the grant of building permission;

v) The KSAMC acted *ultra vires* in exercising its discretion to vary the requirements of the 2017 Provisional Order, as section 11(1A) of the TPCA requires such applications to be forwarded to the Town and Country Planning Authority;

vi) Even if the KSAMC had the authority to deal with the application, it failed to take account of proper factors and policies that apply to the exercise of that discretion;

vii) KSAMC and Shawn Martin were not honest with the Court and have shown a conflict of interest, which disqualifies them from exercising any discretion over the application;

viii) The NRCA draft policy on *de minimis* waiver was breached, as the maximum 30% waiver was exceeded;

ix) WAMH provided no justification for a waiver;

x) None of the material circumstances and considerations in the NRCA draft policy apply to the present case;

xi) None of the factors apply in WAMH's favour.

All of these factual allegations can be disposed of shortly.

[285] There was no evidence to support the contention that the KSAMC had failed to consider the 2017 Provisional Order. In the first place, neither building approval nor planning permission was dependent on the 2017 Provisional Order. The fact that the plans submitted for approval conformed to the 1966 Confirmed order, but did not completely conform with the policies in the 2017 Provisional Order, did not prevent the KSAMC from properly considering the application and granting the permit. The statutory regime had not changed since 2016, as alleged, as the 2017 Provisional Order was still a discussion paper and had not yet been confirmed.

[286] Although it is a fact that no environmental permit had been applied for before the planning permit was granted, the effect of that is a matter of statutory interpretation. Since the TCPA only requires applications which do not conform with the 1966 Confirmed Order to be referred to the Town and Country Planning Authority, there was no legal or factual basis to find that the KSAMC had acted *ultra vires* in dealing with the application. Furthermore, as the affidavit of Mr Martin set out the factors considered in determining whether to grant the planning permit, it cannot be said that he failed to consider relevant factors. The factors and policies that the 1st to 10th respondents claim were not considered

are the said policies contained in the 2017 Provisional Order to which they erroneously alleged the KSAMC was bound.

[287] The allegation that the KSAMC and Mr Martin had a conflict of interest simply because they made efforts to justify their decision was spurious, baseless and unmeritorious, as the KSAMC was entitled to defend the position it had taken and the decisions it made.

[288] With regard to policies B H1, B H2, B H3, and SP H30, all of these were policies under the 2017 Provisional Order, and were, at the most, for material consideration only. They did not bind anyone.

[289] Finally, the issue of the NRCA's draft guidelines on waivers for variations in density was not an issue in the court below, and was raised for the first time in submissions before this court. Mr Leonard Francis, in his affidavit filed 30 November 2018, deposed that the policy allowed waivers for variations in density of up to 30%, and the variation in WAMH's development was 26%. Mr Francis was not cross-examined, nor was his affidavit evidence seriously challenged by any other affidavit evidence from the 1st to 10th respondents. The 1st to 10th respondents' claim that WAMH's variation had exceeded the 30% was based on the unsubstantiated claim that WAMH had built two-bedroom units.

[290] The KSAMC further challenged several findings of facts made by the learned judge as plainly wrong and against the weight of the evidence. I will deal with each one in turn.

> (1) The finding 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."

[291] This finding is unsupported by any proper evidence. The undisputed evidence is that there is an existing three-storey building on Birdsucker Avenue, which the 1st to 10th respondents accept is there, but claim was built before the 2017 Provisional Order. The existence of that building proves that there would have been no material change to the area caused by WAMH's development, regardless of whether it was built before the 2017

Provisional Order was gazetted. Also, the learned judge allowed herself to indulge in speculation by her finding that, undoubtedly, neighbouring and adjoining premises would be affected in the absence of any evidence before her of that fact.

[292] The uncontested fact is that the area on which the development was to take place is zoned for residential use under the existing 1966 Confirmed Order, and is provisionally so zoned in the 2017 Provisional Order. There have been three-storey buildings in the area for decades, as per the affidavit evidence of Sanya Goffe, one of the 1st to 10th respondents. In Mr Young's affidavit, he said it was thought that the development was intended to be a small townhouse unit. Presumably, there would have been no objection to that.

(2) "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."

[293] In truth, there was no documentary proof presented to the court regarding ownership and occupation by the 1st to 10th respondents, except for the assertions made by Mr Young in his affidavit. However, it was open to the learned judge to believe him on the issue, and to accept what he said as factual, especially as there was no real challenge to it.

(3) "Mr. Shawn Martin of the Kingston and St. Andrew Municipal Corporation…has not demonstrated that that (sic) he considered the lot size of number 17 Birdsucker Drive as per policy BH1. Alternatively, he failed to appreciate that granting the building permit would lead to over development of the lot as this allowance was exceeded by 5 rooms."

[294] It was difficult for me to understand the basis of this finding. Firstly, policy B H1 is in the 2017 Provisional Order. There is no law that says that Mr Martin ought to have considered B H1 in the 2017 Provisional Order. It was, of course, a material consideration of a planning nature, and for that reason, it may be considered when deciding whether or not to grant planning and building approval. It cannot, however, be viewed as a binding

factor. The learned judge clearly went too far in finding that, because it was a material consideration, it could not be resiled from.

[295] It is also difficult to see how Mr Martin was to "demonstrate" his consideration of the lot size as per policy B H1. Mr Martin, in his affidavit, indicated that consideration had been given to the 2017 Provisional Order as a guide to the decision-makers. This was unchallenged. Although the KSAMC were entitled to treat aspects of the 2017 Provisional Order as material considerations as to where planning and zoning of the area, as a matter of policy was heading in the future, they were not bound by that policy, as, up to the time of the decision to grant the planning and building approvals, the 2017 Provisional Order, for reasons already set out, remained a discussion document.

[296] In the affidavit of Mr Martin, filed 11 December 2018, he outlined the procedure for the assessment of building and planning permits. He noted that applications for planning permission are assessed in accordance with the provisions of the TCPA, the 1966 Confirmed Order, the 2017 Provisional Order, and the "Manual for Investment & Development and best practices" developed by the KSAMC. He noted that the 2017 Provisional Order was still under review. He indicated that after an application is assessed by the building and planning officers, and the relevant codes, laws, and regulations are satisfied, the application is sent to the Building and Town Planning Committee (a committee of the KSAMC) with a recommendation, and that committee reviews each application and determines whether it should be refused, approved, or approved subject to conditions.

[297] Mr Martin maintained that, in addition to the 1966 Confirmed Order, other material considerations in assessing the grant of permit were:

(a) the 2017 Provisional Order;

(b) the approval which already ran with the land and the environmental permit that had been granted to the previous developer;

(c) the character of the neighbourhood, in that other three and four-storey buildings exist in the immediate and general environs and on Birdsucker Drive itself; especially 2-6, 8, 19 and 28 Birdsucker Drive. Same consideration was also given to the neighbouring Graham Heights;

(d) the provision of adequate infrastructure;

(e) the provision of 20 parking spaces, which is more than the 1.25 required for parking per unit;

(f) that amenities exceed the 30 square metres per unit required;

(g) that provision for sewage exceeded the requirements for the 12 units;

(h) that boundary and set backs were acceptable;

(i) that based on the building design, plot area ratio was adequate; and,

(j) that conditions could be imposed to ensure an adequate supply of potable water for the units, including for rain water harvesting.

[298] Mr Martin agreed that the development had a number of habitable rooms slightly above the recommendation in the 2017 Provisional Order. However, he pointed out that the said 2017 Provisional Order encourages development to meet the housing needs in the local area, provided that it met the recommended standards in the other key areas, and was not otherwise prejudicial to the environment, residential amenities, public health, or natural resources. He maintained that policy B H1 had to be balanced against the need for housing developments to be located in areas where the basic infrastructure and amenities existed or could be provided. The KSAMC clearly considered policy B H1.

[299] With regard to the issue of setbacks, Mr Martin said consideration was given to the fact that the property at 8 Birdsucker Drive also had a setback less than what was required. He also noted that no objection had been taken by the 1st to 10th respondents at the stage where application had been made to modify the restrictive covenants. The issue of setbacks was clearly considered.

[300] The law speaks to the duty to take account of the "Development Order", which at the time was the 1966 Confirmed Order. Furthermore, the learned judge did not indicate why she rejected the evidence from Mr Martin, in his affidavit, that the 2017 Provisional Order had been considered, and that lot size, density and setbacks had been considered. There was no affidavit evidence which seriously challenged his assertions. It is unclear, therefore, why the learned judge rejected his evidence.

[301] Furthermore, the policy in the 2017 Provisional Order itself (SP H31) does permit an allowance to be made for excess rooms with acceptable densities "being determined by the character and actual density and zoning of adjoining sites".

> (4) "Nowhere in the evidence of the witnesses for the 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."

[302] Unfortunately, the 1st to 10th respondents were able to convince the learned judge that the 2017 Provisional Order was the development order that the KSAMC was bound to take account of, and that the KSAMC was bound to adhere to its strictures. This caused her to place greater emphasis on policies B H1, BH 2 and SPH 30 in the 2017 Provisional Order, than was legally required.

[303] She also seemingly rejected the evidence of Mr Martin, that based on the building's design, the plot area ratio was considered to be adequate. There was no evidence led which countermanded that that was a material consideration by the KSAMC. Certainly, there was no evidence to suggest that it was unreasonable or irrational for the KSAMC to take account of the building design in making its decision. The KSAMC clearly gave

consideration to the size of the lot, but made a decision based on the design of the building.

(5) "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."

[304] The learned judge accepted the assertions of the 1st to 10th respondents that there were breaches of the planning and building approvals. Significantly, much of what was alleged by the 1st to 10th respondents as breaches were with regard to the policies in the 2017 Provisional Order, and matters which were alleged to have taken place after the permits were granted, which could not have affected the initial validity of the grant.

[305] In the affidavit of Wayne Marsh, a director and shareholder of WAMH, filed on 29 November 2018, he pointed out that the approval WAMH received from KSAMC was for 12 one-bedroom units in a single three–storey building, with parking at grade level beneath a section of the building. It was not a four-storey structure as alleged, and was three storeys from the ground up, with a basement below. WAMH received approval from the Real Estate Board in January 2018, and construction began in February 2018. Mr Marsh said WAMH honestly believed that the environmental permit received by M & M was transferable.

[306] He denied that construction had caused any dust nuisance, as mitigating factors had been put in place to minimize dust levels. He admitted that on some occasions, work did go beyond 7:00 pm, because on those days when concrete was being poured, it could not be stopped until complete, as the concrete would harden. In relation to the complaint of work being done on Sundays, he stated that that only occurred once, and he gave instructions to put a stop to it.

[307] Mr Marsh denied that WAMH had any contract to sell two–bedroom units. He also said that the building had to be completed in two years or else the permit would have become void. This is actually stated in the permit itself. When WAMH applied for the environmental permit, the construction was only at ground level. Mr Marsh was not cross-

examined. The learned judge found that he had not come to court with clean hands for the reason that, in her view, he had hurriedly completed the construction knowing that the respondents had had objections. I am not sure that that was an entirely fair assessment. When the claim was filed, WAMH was in possession of permits from public bodies which were statutorily authorised to issue those permits. There was no injunction in place to prevent construction from continuing. WAMH had gone to court and applied to modify the restrictive covenants, which no resident objected to. The planning permit would have expired after two years (although renewable), during which time the construction had to be commenced and completed. There was no legal or moral obligation on WAMH to defer construction because the respondents were raising objections to the various entities, in circumstances where those agencies had placed no stop order on the construction. These are separate considerations from any allegation that WAMH breached the permit subsequent to its grant.

[308] In any event, the KSAMC denied that there were any unknown breaches at the time of the hearing, but the learned judge rejected this denial. However, there was no concrete evidence before her of any serious breach of the planning permit, which was not dealt with by the KSAMC, and there was only the speculative accusation, made by the 1st to 10th respondents, that two-bedroom units were being built. The 1st to 10th respondents had inferred that two-bedroom units were being built from the size of the one–bedroom units, as well as the fact that the units had two full bathrooms. They also claimed that a real estate agent had advertised the units as two-bedroom units. From the submissions of Mr Goffe, he had seemingly surmised that the units were built in a larger size from the usual one-bedroom unit, in order for them to be "converted" to two–bedroom units. It is, therefore, unclear from the 1st to 10th respondents' claim whether what they alleged was being built were large one-bedroom units that were intended to be converted to two-bedroom units, or actually originally constructed two-bedroom units.

[309] WAMH denied building two-bedroom units and the KSAMC agents saw no two-bedroom units when they did their site inspection. What is clear, is that the learned judge

did not attend the site herself, armed with the permit(s) to see what was built on the ground, as opposed to what had been permitted. None of the 1st to 10th respondents visited the site either. Their account was based on what they claimed to have seen in advertisements for the sale of the property. No expert evidence on the issue was called, such as that of a surveyor.

[310] Mr Miguel Nelson of NEPA, in his affidavit filed 30 November 2018, indicated that, on 27 July 2018, after the environmental permit and licences had been granted, he visited the site with other personnel from the enforcement branch of NEPA and observed that construction was being conducted in general accordance with the approved plans.

[311] Furthermore, breaches by the developer subsequent to the grant of the permit, did not form part of the claim by the 1st to 10th respondents against the entities. The remaining breaches found to exist by the learned judge, which could have impacted the validity of the initial grant, were the breaches on the plan in relation to the draft 2017 Provisional Order, which I have already dealt with.

(6) "There is no indication that any inspection was undertaken by the KSAMC."

[312] This finding, in my view, is against the weight of the evidence. The evidence was that inspections were carried out at the site after the grant of the planning and building permit both by NEPA and the NRCA and by the KSAMC. NEPA and the NRCA discovered there was no environmental permit but found construction was in accordance with the permit and the plan. The evidence was that inspections were carried out by the KSAMC on two occasions in 2018. Xavier Chevannes, in his affidavit, filed 30 November 2018, stated that he had been the acting Chief Engineering Officer at the KSAMC since May 2018, and that part of his job was to make recommendations to the KSAMC's Building and Town Planning Committee regarding applications for building and planning permission for developments, as well as specific responsibility for monitoring compliance with said permission.

[313] Mr Chevannes noted that, on 9 October 2018, a routine inspection of WAMH's development was carried out. It was observed that WAMH was "building contrary to the approvals and permissions" from the KSAMC, and a Cease Work Notice was served. My understanding of his report is that, at basement level, two studio units and two water tanks had been converted into two one-bedroom units. On the first and second floors, which each had five one-bedroom units, it was observed that the door openings had been relocated and window height increased. On the third floor, it was observed that the roof was unusually high, and there were two one-bedroom units.

[314] Although Mr Chevannes did not say so, it is clear from his evidence that WAMH, by the conversions in the basement, would have made two additional one–bedroom units above the 12 for which it had permission. Interestingly, in the fourth affidavit of Mr Young, at para. 3, he maintained that he had been advised by Mr Goffe that, pursuant to an Access to Information Act request, Mr Goffe had seen the plans submitted to the KSAMC by WAMH, and they showed a total of 12 units, which were to be 10 one-bedroom units and two studio units. KSAMC approved a plan for 12 one-bedroom units. This discrepancy between the hearsay statement made by Mr Young in his affidavit, and the approved plans was never explained by the KSAMC or resolved by the learned judge. I can only conclude that it was accepted that the drawings submitted and approved were for 12 one-bedroom units.

[315] Mr Chevannes, in his affidavit, stated that, on 22 October 2018, WAMH submitted an application, for approval of the existing changes it had made, which were:

> (i) reduction of tank storage to allow for additional storage room and a ping pong room;
>
> (ii) a loft added to the third floor (roof level) to accommodate two additional one-bedroom units (units 13 and 14); and
>
> (iii) to correct references to units 1 and 2 to read Strata Office Lounge (unit 1) and Multi-purpose Gym Area (unit 2).

That application, according to Mr Chevannes, was being processed for submission to the Building and Town Planning Committee.

[316] Significantly, Mr Chevannes maintained that, on a site visit on 20 November 2018, he observed that building activity had ceased, and he saw no two-bedroom units. He took no further enforcement action as work had ceased, and WAMH had submitted an amended application regarding the breaches outlined. We now know that the application was not approved at the time the matter was before the learned judge. Since then, the affidavits show that the KSAMC did not process WAMH's application for an amendment despite its written pleas to do so. The evidence indicates that, because the matter was in court, the KSAMC preferred to await the judgment. It was indicated to this court that, before the judgment was delivered, WAMH withdrew its application and reverted to the original plan.

[317] The learned judge did not specify the period she was referencing in her finding, as to the failure to inspect. Neither did she indicate what, in her view, as regards her interpretation of the law, was the optimum number of site visits the KSAMC is to make to each site after the grant of planning and building permit, in order for them not to be considered as breaching their statutory duty to inspect. However, based on the evidence of the activities taken by KSAMC, it is my view, the learned judge would have erred in her finding that there had been a failure to inspect. There was no indication in her judgment, that she gave any regard to the evidence of Mr Chevannes with regard to the inspections made by KSAMC, and failed to mention his evidence, at all.

(7) <u>The "KSAMC erred in treating the application by WAHM [sic] as an amended application instead of a new application."</u>

[318] The learned judge did not indicate, as a matter of law, why the KSAMC was legally bound to treat WAMH's application as a new application rather than as an amendment to the permit that was already in place for the benefit of the land. In my view, there are two ways of looking at this issue. On the one hand, if WAMH had made a new application and succeeded, a single piece of land would have had two permits enuring to its benefit.

If WAMH did not build, and had sold the land, the third owner would have had to seek yet another permit in order to make changes to WAMH's plan, and if successful, that land would, theoretically, now have three permits enuring to its benefit. It may well be that that is what Parliament intended - that each permit would simply go into abeyance as soon as the new one is granted, so that where a developer acquires a property with a planning permit in existence, but does not intend to build to that specific plan, the developer would have to apply for a new planning permit. I am, however, not convinced that this is an efficient way to proceed, or even that such an interpretation is supported by the provisions in the statute. It seems to me that Parliament, by including section 15(4), intended to avoid a multiplicity of applications regarding the same land, which under the Torrens system, can change ownership easily and frequently. When sections 15(4) and 22(1) of the TCPA are read together, it seems to me that there is a greater argument for treating the application relevant to land with a permit already in place as an amendment to the permit, rather than as a new application.

[319] Taking the argument further, the planning permission for the land runs with the land, and once granted, it exists for the benefit of any new owner or assignee of the land. Therefore, any such person who seeks to develop the land may choose to do so using the existing permit or by applying to amend or modify the existing permit by submitting the required documentation. The KSAMC can grant the modified permit if it is expedient to do so. In such a case, plans to support the modification would have to be submitted. If what was required was permission not for one–bedroom units, but to add a pool or a gym, would a new application be necessary? And if a new application would not have been necessary to add a gym or a pool, why would one be necessary to modify the permit to build one-bedroom units, instead of studio units? It would still be a permit for residential development in the stated category of one to 25 rooms. A better argument could be made for a requirement for a new application if the change was from a residential to a factory development, as there would have been no such permission previously in existence, enuring for the benefit of the land.

[320] However, this issue is one of law and not of fact. The learned judge indicated that even if the application could be treated as one for modification, this would have to be done under Part V, section 22, of the TCPA. A reading of section 22 suggests that revocation and modification of existing permits do not necessarily depend upon an application. Revocation and modification can be done by the Town and Country Planning Authority if it appears expedient to do so. Section 22, however, requires any order for revocation and modification to go to the Minister for confirmation. This section would appear, at first blush, to only deal with the actions of the Town and Country Planning Authority, acting on its own motion, and the reference to the Minister is designed to protect the developer from arbitrary modifications. This is supported by the provisions in section 22(2), which require the Minister to hold a hearing before confirming the order for revocation or modification.

[321] Nonetheless, it appears to me that there is no reason why an application for modification of an existing permission could not be made by a developer under this section. There does not appear to be any other section in the TCPA under which such an application may be made. Section 15(4) does state that the permission granted under Part III is to be without prejudice to the right to revoke or modify by virtue of the provisions of Part V.

[322] As said earlier, the learned judge rightly pointed out that there is no evidence that the application for amendment was referred to the Minister for confirmation as required by section 22. The question whether there was a referral to the Minister under section 22 was entirely a question of fact for the learned trial judge. This fact had not been addressed by the KSAMC. However, the effect of the failure to refer under section 22, if WAMH's application was indeed treated as an amendment, was a question of law for the learned trial judge to determine. She did determine that even if it was an amendment, section 11 would still be applicable and an environmental permit would still be required. In my view, a failure to refer the application to the minister could have one of two possible effects. The first possibility is that it was merely irregular, and the second is that it would

render the amended permit issued void. I would lean more in favour of an irregularity, however, based on my opinion as to the effect of section 11, it is not necessary to decide that issue one way or the other, in this case.

(8) "The learned judge erred in law and in fact and was plainly wrong when she drew adverse inferences and made adverse findings of fact in relation to…Mr Shawn Martin without the witness being cross-examined on those issues."

[323] The case management orders made on 6 February 2019, extending time for affidavits to be filed, made no order for the cross-examination of affiants.

[324] In his affidavit filed 18 October 2018, Mr Young made reference to Mr Goffe and a set of drawings that bore no resemblance to that submitted to the KSAMC for approval. In his affidavit of 8 November 2018, Mr Young spoke of documents viewed by Mr Goffe pursuant to his Access to Information Act request. He maintained that Mr Martin "falsely" claimed to have taken account of the 2017 Provisional Order, and that under that the 2017 Provisional Order, multifamily units are not allowed on parcels of land less than ½ acre. He also asserted that there was no document from the KSAMC showing why the development had been allowed despite the provisions of the 2017 Provisional Order.

[325] It is an admitted fact that WAMH had met with residents before development began, and did present a plan that was different from the one eventually submitted to the KSAMC and NEPA. Concerns were raised by residents regarding modification of the restrictive covenant. WAMH applied for modification of the restrictive covenant, and an order in respect of that was granted 9 March 2018. The respondents did not participate in or make any objections to the application for modification of the restrictive covenant.

[326] In the affidavit of Mr Martin filed 13 August 2018, as planning officer with the KSAMC, in response to the application for injunction, he stated that the guidelines and policies for development in that area allowed for a density of 50 habitable rooms per acre. KSAMC considered an application by WAMH to amend planning permission to change from studios to one–bedroom units and from two storeys to three storeys. This he said amounted to 26 habitable rooms. He also maintained that the application was properly

assessed, taking account of relevant factors which he listed. Mr Martin, in his third affidavit filed 11 December 2018, set out the material considerations in the assessment of WAMH's application, which included: (a) the 2017 Provisional Order; (b) the fact there was a previous planning, building and environmental permit on the said property; (c) the existence of other three and four-storey multifamily buildings in the immediate and general environs; (d) the fact that there was adequate infrastructure and utility service in place; (e) the fact that parking was more than required; (f) the fact that the amenities were more than required; (g) that provision for sewage disposal was more than adequate; (h) the fact that the boundary setbacks were acceptable; (i) the fact that plot area ratio was adequate based on the buildings design; and (j) the fact that conditions could be imposed. He maintained that the KSAMC acted within the parameters of the law and practice of the approval process.

[327] In his affidavit, dated 30 November 2018, Mr Martin again set out material considerations for the building and planning permission to WAMH, which he deposed included the character of the neighbourhood and precedents, there being other three and four-storey multifamily buildings in the area and on similar lot sizes. He was not challenged on this and was not cross-examined.

[328] WAMH's application was considered and assessed by the planning department of the KSAMC, and an assessment form was produced and exhibited by the 1st to 10th respondents. The form is dated 8 December 2017, and indicates that the applicant's proposal was for planning permission "to amend the previously approved multifamily apartment development" at the relevant location. It also indicated that the applicant sought a proposed redesign of the development proposal, whereby the floor layout, site spatial layout and architecture proposal were to be modified. It requested approval for 12 one-bedroom units (as was previously approved) in a single three-storey building with parking at a grade beneath a section of the said building with elevator shaft, swimming pool, water tanks, guard house and garbage receptacles.

[329] The 1st to 10th respondents made heavy weather of the use of the expression "as was previously approved" and claimed it was proof of the KSAMC's deception. In my view, it was a clear error that did not require that the court be detained by it, as it proved nothing one way or the other. There was no dispute that what had previously been approved for M & M were studios.

[330] The application further indicated that no construction had begun on the site. The application refers to the 1966 Confirmed Order and the TCPA. Though the 1st to 10th respondents complain that it does not refer to the 2017 Provisional Order, there is no valid legal reason why it should, as it properly references the development Order contemplated by the legislation, which is the Confirmed Order.

[331] Under the heading "Planning Department Assessment", it was noted that the habitable rooms were "Acceptable". The respondents complain that the assessment makes no mention of the office or gym, neither does it state whether any other agency was consulted. They have, however, given no valid reason why it should, since the relevant issue was habitable rooms, other than to ask the court to accept the omission as proof that the assessment was not properly carried out.

[332] The application came up again for building permission, where it was indicated that building approval was recommended by the Chief Engineering Officer, and that planning permission had been recommended by the planning department of the KSAMC. However, on 9 October 2018, there was a stop notice issued, as a result of the discovery that WAMH had been building contrary to the approval issued by the KSAMC.

[333] Although the learned judge rejected the affidavit evidence of Mr Martin and made several adverse comments with regard to his evidence, Mr Martin was not cross-examined, and he was not discredited by any other account of events that was more credible or at all. I agree with counsel for the KSAMC that the learned judge had no basis for her adverse findings with regard to Mr Martin, in the absence of any evidence to contradict his account or to discredit him in any way.

(9) "The learned judge erred in law and in fact by determining disputes of fact in the absence of cross examination of affiants…"

[334] The 1st to 10th respondent's claim that the breach of the 2017 Provisional Order had negatively impacted the lighting at 2 Lloyds Close, and that the three-storey building had changed the profile of the neighbourhood, was not supported by any evidence other than their own assertions, and neither Mr Young or Mrs Goffe, nor any of the other respondents, were cross-examined on these allegations.

[335] In the affidavit of Mr Marsh, filed 13 August 2018, in objection to the application for an injunction filed by the respondents on 13 August 2018, he indicated that he was of the mistaken view that the environmental permit was transferable and had operated under that misapprehension. He, therefore, submitted an application on 2 May 2018. It was also maintained that WAMH was not in breach of policy B H1 or B H2 of the 2017 Provisional Order, as a three-storey building already existed at 10 Birdsucker Drive. Mr Marsh was not cross-examined.

[336] In the second affidavit of Mr Marsh, filed 29 November 2018, he said that at the time of the purchase of the property, WAMH was provided with approvals from the KSAMC, and permits and licences from NEPA, that had been granted to M & M. He repeated that they had honestly believed that the environmental permit granted to M & M was transferrable to WAMH. The learned judge found, however, that WAMH had deliberately flouted the law with respect to the environmental permit. However, I am not sure that such a finding was supported, or that an inescapable inference that WAMH had deliberately flouted the law when it failed to apply for the permit could properly be drawn from that evidence alone, especially in light of the fact that there was no cross-examination.

[337] The learned judge found that Mr Marsh had not come to court with clean hands and had pursued the development with indecent haste. As a result, she discounted any

prejudice that WAMH would suffer as a result of the grant of the orders sought. I am not sure, that based on the claim of the illegality of the grant of the permit to WAMH, that there was any evidence to support a finding that the alleged failures of the KSAMC should be placed at the feet of WAMH.

[338] These grounds would, therefore, succeed.

Issue 11 - whether the learned judge was wrong to grant an order of *certiorari* against the KSAMC (grounds a, g, h, I, j, k, dd, ee, ff, gg, hh of the KSAMC's appeal)

Disposal of issue 11 and the grounds related thereto

[339] *Certiorari* was granted by the learned judge, against the KSAMC, largely on the basis that the proposed development plan was in breach of section 11 of the TCPA, section 9 of the NRCAA, as well as in breach of the 2017 Provisional Order. I do not, however, agree that in granting the planning permit, the KSAMC acted illegally.

[340] The discretion granted in the TCPA to grant planning permission is wide, but not unlimited. In exercising its discretion, the KSAMC had a duty to act lawfully and fairly. That duty to be fair extended to the applicant developer also. In the final analysis, it was the function of the KSAMC, as the local authority, to decide whether to grant or not to grant planning and building permits, having regard to the law and any other material consideration.

[341] The learned judge's function was to review the lawfulness of that decision. The real question is whether the decision to grant building and planning permits was one that the KSAMC, in the exercise of its powers, was lawfully able to make. It is not a question whether the decision is one the learned judge or the 1st to 10th respondents think they should have made. The question is whether it was in the discretion of the KSAMC to make these decisions, and whether, in making these decisions, it acted lawfully, rationally and reasonably.

[342] I believe I have already shown that there was no breach of the 2017 Provisional Order as the KSAMC was not bound by its provisions, even though the KSAMC has admitted that the 2017 Provisional Order was consulted from time to time as a "guide". The learned judge's view that since the 2017 Provisional Order was used as a guide by the KSAMC, they were effectually bound by its terms is untenable. I have also shown that section 11 of the TCPA is not mandatory, and the failure to follow its strictures would not render the grant of the permit void. The KSAMC also did not act in breach of section 9 of the NRCAA, as that provision makes no reference to section 11 of the TCPA, or to the TCPA at all.

[343] Mr Goffe cited the case of **Aylesbury**, but this case did not advance the claims by the 1st to 10th respondents. That case involved the grant of planning permission to build a crematorium and car park in an area at risk of flooding. The River Thame runs through the area of the proposed site. The Parish Council sought judicial review of the decision to grant planning permission on the basis that the planning authority had failed to properly consider two policies in the National Planning Policy Framework ('NPPF'): the policy concerning development in "areas at risk of flooding", and the policy for the "presumption in favour of sustainable development". The application was dismissed, and the Parish Council appealed. The two main issues for decision on appeal were: firstly, whether planning permission had been granted as a result of the planning authority's misunderstanding of the NPPF policy for development in "areas at risk of flooding", particularly its failure to properly apply the required "sequential test"; and secondly, whether the planning authority had understood correctly and properly applied the "policy for the presumption in favour of sustainable development". The first issue necessitated a consideration of whether the relevant planning officer, who had authored the report of the committee that recommended the grant of planning permission, had provided advice which did not accord with the government policy for development in areas at risk of flooding. That officer had advised that sequential assessment was unnecessary because of the existing development at the site, whereas the NPPF policy for development in areas at risk of flooding required local planners to "apply a sequential, risk-based approach to

the location of development to avoid where possible flood risk to people and property". The report also acknowledged that the planned carpark to serve the crematorium would likely be flooded in the winter months, and that the crematorium would not be allowed to operate during these periods of flooding.

[344] The NPPF policy also provided that the "aim of the sequential test is to steer new development to areas with the lowest probability of flooding". It advised that development should not be allocated or allowed if other reasonably available sites appropriate for the development existed in an area with a lower probability of flooding.

[345] The developer had claimed that the proposed development would alleviate the existing risk of flooding at the site itself, and on neighbouring land. There had previously been a restaurant and carpark on the site, which it was proposed would be demolished and replaced with the crematorium built 800 mm above ground level.

[346] In my view, **Aylesbury** is distinguishable from the instant case. The KSAMC is not accused of failing to carry out any required test under existing law or order before granting the permit. In the case of **Aylesbury**, the planning authority had failed to carry out the sequential test, which was to be done in order to "direct development away from areas" where the risk of flooding was highest. This was a requirement of government policy which applied to the application. The decision in the case revolved around the principles touching and concerning planning officers' reports to committees. The court in **Aylesbury**, relying on **R v (Morge) v Hampshire County Council** [2011] PTSR 337, at para. 22, noted that the principle is that "[s]uch reports ought not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge". It went on, at para. 22, to say that:

> "The question for the court will always be whether, on a fair reading of his report as a whole, the officer has significantly misled members on a matter bearing upon their decision, and the error goes uncorrected before the decision is made. Minor mistakes may be excused. It is only if the advice is such as to misdirect the members in a serious way - for example, by failing

> to draw their attention to considerations material to their decision or bringing into account considerations that are immaterial, or misinforming them about relevant facts, or providing them with a false understanding of relevant planning policy – that the court will be able to conclude that their decision was rendered unlawful by the advice they were given…"

[347] Those issues do not exist in this case. The decision to grant the building and planning permits was one that the KSAMC was lawfully entitled to make. There was no evidence that the KSAMC was not entitled to make a grant or made any error of law in the grant of the planning approval to WAMH. The respondents failed to present any evidence to the learned judge that the KSAMC was not entitled, under sections 10 and 11 of the TCPA, to grant planning approval to a developer whose application conformed to the 1966 Confirmed Order, having taken account of all other material considerations. Therefore, having considered the issue in the round, I am of the view that there was no illegality in the grant of the planning permission in so far as the plan was not in breach of the 1966 Confirmed Order. Although consideration was given to the provisions in the 2017 Provisional Order, the KSAMC was not bound by those provisions over and above any other consideration, and the KSAMC did not act *ultra vires* in failing to follow it slavishly.

[348] The remaining questions pertaining to the grant of *certiorari* surround the question of whether the grant was unreasonable in the Wednesbury sense or was irrational, or, whether the decision to make the grant was made taking into account irrelevant considerations or failing to take account of relevant considerations. The question is whether the KSAMC gave due consideration to all the relevant factors before deciding to grant the permit.

[349] The respondents have not shown where, in the light of the policies in the draft 2017 Provisional Order, and the treatment with those considerations, the KSAMC acted irrationally and/or unreasonably in granting the planning permit to WAMH. The decision to grant the permit was that of the KSAMC within the law and its discretion. Although the 2017 Provisional Order may have been a material consideration, the KSAMC was not

bound by its provisions. Having considered it, in the light of the fact that density, setbacks and lot size ratio were left to its discretion, it could not properly be said that it acted irrationally in not adhering to its strictures.

[350] The complaints by the respondents surrounded density, plot area ratio, privacy, lighting, air flow, and setbacks, which the respondents said were not fully in accordance with the policies set out in the 2017 Provisional Order. The argument would have to be that the decision to grant the permits would have been unreasonable and irrational in the light of these breaches, as well as the failure to hear the respondent's objections to the development. The witnesses for the KSAMC, as I have already outlined, stated the matters that were considered and the reason for granting the permits despite these considerations. There was no rebuttal evidence provided by the respondents to show that these reasons were not valid ones.

[351] The unchallenged evidence before the learned judge was that the KSAMC made an informed decision. The KSAMC considered the design of the building, with only 12 one-bedroom apartments, and concluded that based on that design, the construction could be allowed.

[352] The inadequacy of the setbacks was explained to affect only one section of the building, which the KSAMC did not think was grave enough to affect the privacy of the neighbours. The KSAMC pointed out that the inadequate setback only affected open balconies on one side of the building and would not likely affect privacy. This was not contradicted. The 1st to 10th respondents' response to this was only that they, as the affected neighbours, were not consulted. This may well be, but that does not affect the lawfulness of the decision. Again, it cannot be said that this was not a decision the KSAMC ought not to have taken within their own discretion, or that it was an irrational decision.

[353] As for density, the complaint regarding density seems to have largely arisen as a result of the lot size, the requirements of the 2017 Provisional Order, and the 1st to 10th respondents' insistence that two-bedroom units were being built. To date, there is no

factual evidence that any two-bedroom units were built. The only evidence before the learned judge, and indeed this court, is that only one-bedroom units have been built. To the extent that these one-bedroom units exceeded the requirements under the 2017 Provisional Order by five habitable rooms, there was no evidence that this led to "overdevelopment" of the lot, other than the obvious implication that the density was exceeded.

[354] No evidence was led before the learned judge to contradict the position taken by the KSAMC regarding the lot size ratio. In the light of the discretion existing within the local planning authority, it was not sufficient simply to say that the lot size ratio was not in accordance with the policy document. There is a presumption of competency to make these decisions within the KSAMC, which has not been rebutted.

[355] Counsel Mr Goffe, in a last-ditch challenge to the KSAMC's discretion to decide the issue, submitted that the KSAMC could not have properly exercised its discretion to waive the breaches of the 2017 Provisional Order in WAMH's plan, because the KSAMC were not aware of those breaches. This, I find to be a surprising assertion, backed by no evidence at all.

[356] In my view, the 1st to 10th respondents failed to place before the learned judge any evidence which pointed to the KSAMC making a decision which it was not lawfully entitled to make either on the grounds of illegality, procedural impropriety, irrationality or unreasonableness. There was nothing to show that the grant of the permit was "so outrageous and in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it", (see the **Council of Civil Service Unions and Others v Minister for the Civil Service** [1985] 1 AC 374, ('**CCSU case**'), at page 410).

[357] In the light of the consideration given to the nature of the inadequacies shown, it could not be said that the KSAMC acted unreasonably or irrationally in granting the permit. In the premise, I would hold that the learned judge had no basis on which to exercise

her discretion to grant an order of *certiorari* to quash the decision made by the KSAMC to grant planning permission to WAMH.

[358] Mr Goffe maintained that the appeal is nugatory, in any event, because the breach of the permit in building other than in accordance with the approved plans has resulted in the permit being null and void, as stated in the permit itself. General condition e) of the permit does state that "failure to comply within the conditions as listed above and the approved plans will be considered a breach and will render this approval NULL and VOID". The conditions referred to as "listed above" are those under General Conditions a), b), c), and d). These relate to the obligation of modifying and discharging restrictive covenants as required, conforming to the approved plans and Building Regulations, keeping the approved plans on site for inspection, and completing construction within two years. With respect to the expiry period of two years, the application can be renewed within or outside of the two-year period. I would assume that even if the permit is rendered void by a breach of any of the relevant general conditions, it could be renewed. That is still within the discretion of the KSAMC. With regard to the environmental permit, general condition 5 entitled the NRCA, in its sole discretion, to revoke or suspend the permit if there was a breach of any term or condition of the permit, but it does not state that the permit would be void.

[359] The 1st to 10th respondents' case below was not argued on the basis that there were breaches of the approved plan, which rendered the permit null and void as stated in the permit itself. The learned judge did not base her decision on any such claim and did not address that issue. This was merely a submission made by counsel on his feet before the court. In any event, I would hold that, based on section 23 of the TCPA, the statement in the permit could only be read to mean that the breach renders the permit voidable, at the instance of the local authority, as the case may be, otherwise, the local authority would have divested itself of discretion granted to it by statute, on the basis of a statement in a permit document. This it cannot do.

[360] These grounds of appeal have merit.

Issue 12- Whether it was wrong to grant an order of *mandamus* against the KSAMC (grounds c, q, r, aa, dd, ee, ff and gg of the KSAMC's appeal)

(i) Submissions

[361] Mrs Cooper Bennett submitted that the grant of *mandamus* was a fetter on the discretion of the KSAMC as the local planning authority. Counsel argued that the order of *mandamus* to compel the KSAMC to "take steps to halt all actions 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" was so wide as to be impossible to perform. She submitted that the KSAMC was being ordered to halt construction over which it had jurisdiction, where the learned judge found that the construction was not in breach of the 1966 Confirmed Order. Counsel argued that the KSAMC had no duty to enforce, but rather, a power to enforce, and a discretion whether to do so or not. This, she said, is set out under sections 23(1) and 32 of the TCPA.

[362] Counsel maintained that for *mandamus* to be granted, there must be a clear duty to perform rather than a discretion. The enforcement provisions under the TCPA, counsel stated, were purely discretionary. Counsel pointed to section 23, which she said, mandates action if it appears to the KSAMC Town Planner or the Authority that action was necessary. Counsel argued that an order of *mandamus* to send the authorities to search for possible breaches was unreasonable.

[363] Counsel contended that the learned judge was wrong in her interpretation of the various provisions in the legislation and her position regarding the 2017 Provisional Order. Counsel submitted that the allegations that the approval was made in breach of the 2017 Provisional Order were not sustainable and an order for *mandamus* based on alleged breaches of that Order ought not to stand. Furthermore, she said, the orders on judicial review were being made when the building was 90% complete, which, according to her, was irrational.

[364] Counsel Mr Goffe argued that there had been no exercise of any discretion by the KSAMC, as the KSAMC was not aware of the change in density caused by WAMH, because

the application had been for 12 one-bedroom units, which amounted to 24 habitable rooms. However, what was being offered for sale was 12 two-bedroom units, which amounted to 36 habitable rooms. Nor was the KSAMC aware that the building was too close to the neighbouring boundaries. The KSAMC, counsel said, had admitted that some of the balconies of the building were too close to the adjoining houses, which were the balconies that face and abut the properties of the 7th, 9th and 10th respondents.

[365] Counsel contended that, in this case, the KSAMC had a duty to investigate and not a discretion whether to do so, and ought to have gone to investigate to see what units were being built. If the units being built were two-bedroom units, then they would have been built in breach of the permit, and the permit would be null and void. Even if the appeals are allowed, counsel contended, the permits would still be null and void if two-bedroom units have been built.

[366] Counsel further submitted that even if there was a discretion to waive the breaches, since the KSAMC was not aware of the breaches, it is impossible to know what it was that they would have considered in order to exercise their discretion to waive the breaches. The policy as to how breaches are to be waived, counsel noted, states that the boundaries must be good, and density can only be waived if the breach is no greater than 30%. The breach in density in this case, if two-bedroom units, or more than the 12 one-bedroom units were built, would be above the 30%, and the KSAMC would be bound to apply their own policy, counsel stated.

[367] Counsel argued that, in any event, section 12(1A) of the TCPA would have taken away that discretion to waive the breaches as it clearly states that any plan submitted that is in breach of the development order must be referred by the local planning authority to the Authority.

[368] Furthermore, counsel argued, it is not permissible for a developer to have a permit to build one-bedroom units, and the developer builds two–bedroom units, and then request a waiver of that breach. A new permit would have to be issued, counsel argued.

Counsel also claimed that the number of units had been increased from 12 to 14, and that the KSAMC was aware of this. Counsel maintained that, as a result, the learned judge was correct to make the order of *mandamus* which she made.

[369] Counsel submitted that the size of each room was at least 100 square feet with two full bathrooms, which he maintained meant that there had been an intention to convert the one–bedroom units into two-bedroom units. Counsel argued that the KSAMC were aware that the developer had intended to build two-bedroom units, and at the time they sat to consider reissuing the permit. Therefore, he said, from March 2018, the KSAMC knew that WAMH was building two-bedroom units.

[370] The KSAMC, counsel submitted, are the only ones who can say what was built and the *mandamus* is to force them to investigate and stop what has been done in breach of the law.

(ii) Disposal of issue 12 and the grounds related thereto

[371] *Mandamus* was originally one of the old prerogative writs used as a tool by citizens to compel public bodies to perform their stated functions or duties when they are alleged to have failed in their duty. This remedy of *mandamus* has been retained by Part 56 of the CPR. An applicant must either show that the public body has failed in its statutory duty towards them, or that it has been guilty of some inaction which has risen to the level of an abuse of power or some illegality.

[372] An order for *mandamus* ought to command a public body to do no more than it is legally bound to do, or to do it properly. There must be a clear duty imposed on the public body and not just a discretion (see **Medical Council of Guyana v Dr Muhammad Mustapha Hafiz** (2010) 77 WIR 277, at page 283, citing learned author Albert Fiadjoe in Commonwealth Caribbean Public Law, 3rd edition, page 290). In that regard, we ought to be guided by the definition of that duty, more so, if it is one laid out by statute.

[373] I hold no doubt regarding the jurisdiction of the learned judge to grant an order of mandamus in her full discretion. However, although it is a discretionary remedy, it

ought only to be granted in cases where it is evidentially required. The issue in this case is whether the wide and sweeping order for *mandamus* is justified or necessary, in the circumstances of this case.

[374] Section 22A(1) to (3) of the TCPA provides as follows:

> "22A.-(1) Where it appears to a local planning authority, the Government Town Planner or the Authority that a development specified in subsection (2) is unauthorized or is hazardous or otherwise dangerous to the public, the local planning authority, the Government Town Planner or the Authority, as the case may be, shall serve or cause to be served on any of the persons specified in subsection (3), a stop notice requiring that person to immediately cease the development.
>
> (2) A development referred to in subsection (1) is a development-
>
> (a) which is being carried out in breach of a condition subject to which planning permission was granted; or
>
> (b) which is being carried out without the grant of planning permission.
>
> (3) The persons on whom a stop notice may be served are-
>
> (a) the owner or occupier of the land whereon the development is taking place or has taken place; or
>
> (b) any person who is engaged in the development; or
>
> (c) any other person appearing to have an interest in the land.

[375] The 1st to 10th respondents claimed that there was a duty on the KSAMC to investigate. Certainly, section 22A grants the power to investigate. Implicit in the wording of section 22A, that "where it appears" that a development is unauthorised and so on, that a stop notice shall be served or caused to be served, is a power to investigate and a duty to take action where there is an "appearance" of unauthorized construction. This would have to be based on an objective judgment, and such a duty would be imposed

not only on the KSAMC as the local planning authority, but also on the Government Town Planner and the Town and Country Planning Authority, as the case may be. Of course, the appearance of unauthorized activity can come after an initial investigation. The KSAMC is duty-bound in all cases to ask itself whether there was material on which a reasonably objective decision-maker could believe that unauthorized construction was taking place. In a case where such material exists, there is no residual discretion not to take the appropriate action, where necessary.

[376] Section 23 subsections (1) and (1A) states as follows:

> "23.-(1) **If it appears to the local planning authority, the Government Town Planner or the Authority** that any development of land has been carried out after the coming into operation of a development order relating to such land without the grant of permission required in that behalf under Part III, or that any conditions subject to which such permission was granted in respect of any development have not been complied with, then subject to any directions given by the Minister and to subsection (1A), the local planning authority, the Government Town Planner or the Authority may within twelve years of such development being carried out, if they consider it expedient so to do having regard to the provisions of the development order and to any other material considerations, serve on the owner and occupier of the land and any person who carries out or takes steps to carry out any development of such land and any other person concerned in the preparation of the development plans or the management of the development or operations on such land a notice under this section (hereinafter referred to as an 'enforcement notice') [sic].
>
> (1A) Where a stop notice is served under section 22A, a local planning authority, the Government Town Planner or the authority, as the case may be, shall serve an enforcement notice within fourteen days of the service of the stop notice." (Emphasis added)

[377] Subsection 2 provides for what the enforcement notice should contain, including the requirement for steps to be taken to remedy the breach, for compliance with conditions in the permit, or for demolition or alteration of any building or works. An appeal

against an enforcement notice lies to the relevant minister (section 23A(1)). A further appeal of the Minister's decision lies to the Court of Appeal (section 23A(5)).

[378] Section 23B provides for an injunction to be taken out against the defaulter by the local planning authority, the Government Town Planner or the Town and Country Planning Authority, as the case may be, where the person on whom the enforcement notice is served fails to comply. Section 24(3) provides for the criminal prosecution of anyone who has been served with an enforcement notice but continues to use the land in contravention of the notice.

[379] The enforcement policies are, therefore, clearly established under the TCPA and give to the local planning authority the power to investigate, whilst imposing a duty to take action by the service of a stop order and the discretion to take further enforcement procedures, where "expedient" to do so. These are actions which ought to be taken by the various authorities, and as said in **Simpson's case**, it would "create an anomalous situation" if the courts were to usurp those functions.

[380] In the instant case, after the permit was granted the site was visited and no breaches were observed. The fact that at the time of the application for judicial review, the building was 99% complete, and some units had been purchased by prospective home owners, would not have prevented the court from ordering *mandamus* to compel the KSAMC to do its duty, if there were breaches. That issue would have been still undecided and outstanding regardless of whether the building was complete or not. It would be for the court to craft a suitable remedy for that breach of duty, if it existed.

[381] It is clear that the 1st to 10th respondents' claim for *mandamus* was based on their allegations that the grant of the permit was illegal, as the plans submitted by WAMH were in breach of the 2017 Provisional Order. As the case progressed, it appears the claim morphed into a claim to include allegations of breaches of the permit subsequent to its grant. It is clear to me, however, that any order for *mandamus* based on any supposed breach of the 2017 Provisional Order cannot stand. The law is clear as to that. Counsel

Mr Goffe conceded that there was no breach of the 1966 Confirmed Order. Mr Goffe maintained that the KSAMC had taken account of other material considerations when deciding whether to grant planning permission. In fact, he said, the KSAMC took account of "everything", including the 2014 draft, and the 2017 Provisional Order, yet Mr Goffe would have the KSAMC be bound only by the 2017 Provisional Order not yet in legal force. He took the learned judge down that path, which she erroneously followed.

[382] As the claim morphed, the 1st to 10th respondents made unsubstantiated accusations of two–bedroom units being built by WAMH, which the KSAMC had done nothing about. To date, they have provided no proof of that. It is not clear whether the learned judge accepted the 1st to 10th respondents' allegations regarding two-bedroom units having been built. The KSAMC did visit the site in October 2018 and found no two–bedroom units built in that development. Therefore, it could not have "appeared" to them that there was unauthorized construction in that regard. They did find changes in the approved plans, which caused them to issue a stop notice. There could be no dispute that there was a site visit and a stop notice. There is documentary proof of this. Sections 22A(1) and 22A(2)(a) provide for such an action to be taken by the KSAMC in such circumstances. In fact, following the stop notice, the principals of WAMH applied for an amendment to the permit to allow for the unapproved changes identified by the KSAMC, and for which the stop notice was issued. This application for approval of the changes was not considered by the KSAMC, as by that time, the matter was before the court.

[383] There was no evidence of a refusal by the KSAMC to exercise its discretion to investigate or to do its duty to serve a stop notice. Based on the evidence, by the time of the trial of the claim, the KSAMC had become aware that WAMH had breached their permit by building other than what had been approved. The KSAMC, would, therefore, no longer have a discretion to investigate and enforce, but it having been established that illegal construction took place, it would now have a duty to take the necessary action open to it by law to issue the stop notice. It having done so, the next step would have been the service of an enforcement notice, 14 days after the service of the stop notice.

That enforcement notice would indicate the steps the developer is being required to take to remedy the breach. So, the fact that the construction is now complete does not prevent the KSAMC from taking enforcement measures under section 23 of the TCPA (barring any claim as to time bar in the provisions of the TCPA, which is not within the scope of this appeal). I would, therefore, suggest an amendment to the learned judge's order of *mandamus* to reflect the KSAMC's duty to follow the procedures set out in sections 22A and 23 of the TCPA.

[384] These grounds have some merit but would only partially succeed.

Issue 13 - whether the learned judge was wrong to determine an issue not joined between the parties nor argued without inviting and/or hearing submissions from the parties - (grounds y, z of KSAMC's appeal)

Issue 14 - whether it mattered that the 1st to 10th respondents were also in breach of planning laws or that they had alternate remedies (grounds hh and ii of the KSAMC's appeal)

[385] In the light of the view I have taken of this case, I do not think it is necessary to determine these issues and the grounds related thereto.

Issue 15 - whether the respondents had a legitimate expectation to meet with NEPA prior to the grant of the environmental permit to WAMH by the NRCA (1st to 10th respondents' counter-notice of appeal)

(i) The submissions

[386] The 1st to 10th respondents maintained that they had a legitimate expectation to be heard before the environmental permit was granted, not based on any duty to consult which lies in the NRCA or NEPA, but based on a specific promise and what they said was an undertaking which they had relied on. Mr Goffe contended that the answer to Mr Young's request for a meeting given by Mr Knight of NEPA, that he would arrange such a meeting, was an undertaking by Mr Knight to meet. Therefore, submitted Mr Goffe, the learned judge made an error in finding that the 1st to 10th respondents had no legitimate expectation for a meeting. Mr Goffe argued that there was a distinct promise to meet, although the argument by the NRCA and NEPA in the court below was that there was no

such promise. He pointed to the affidavit of Mr Knight in which, counsel said, Mr Knight had conceded that he had agreed to meet. That counsel argued, was the basis of the 1st to 10th respondents' claim that there was a breach of this specific promise.

[387] Counsel argued further that 1st to 10th respondents' claim in this regard was not based on bad faith, although they could have argued bad faith, but was based on a promise which was breached, and the fact that, if the promise had been kept, it could have had an impact on NEPA's/NRCA's actions. Counsel submitted that the learned judge ought to have found for the 1st to 10th respondents on this issue.

[388] Ms Hall submitted, on behalf of NEPA and the NRCA, that the learned judge was correct when she found that there was no legitimate expectation of a meeting. Counsel argued that not every promise rose to the level of "expectations enforceable by law". There was no issue of an actionable undertaking in this case, she said. Therefore, she contended, the learned judge was correct to consider whether there had been any duty in the NRCA to meet or consult, and found that there had been none. Even without a duty, counsel argued, the 1st to 10th respondents would have had to show that there was in NEPA/NRCA, a practice to consult and or meet, which they had failed to adhere to with the 1st to 10th respondents, and there was no evidence of any such practice. Counsel cited **Legal Officers' Staff Association and Tasha Manley and others v Attorney General and another** ('**LOSA and Tasha Manley**') [2015] JMFC 3, and submitted that on the basis of that authority, the counter-notice of appeal should be dismissed.

(ii) Analysis and disposal of issue 15 and the grounds in relation thereto

[389] For a legitimate expectation to arise there are several criteria. The promise or representation being relied on must be distinct, clear, unambiguous and unqualified, not in conflict with law or statutory duty, moving from a decision-maker, and one on which it was reasonable for the promisee to rely. It cannot be tentative or provisional (see **R v Devon County Council, ex p Baker and another; R v Durham County Council, ex parte Curtis and another** [1995] 1 ALL ER 73). It may also be necessary to show some reliance on the promise or representation to the detriment of the promisee. It must

be an express promise given by the decision-maker on behalf of a public authority (see **CCSU case**, **LOSA and Tasha Manley** and **Auburn Court Ltd v The Kingston & St Andrew Corporation The Building Surveyor and The Town & Country Planning Authority – The Government Town Planner** JM 2001 CA 38), or one which is implied by an established practice.

[390] Although the 1st to 10th respondents claimed a legitimate expectation to be heard before a decision adverse to their interest was taken, the learned judge found that there was no legitimate expectation of a meeting. I see no reason to disagree with her. Neither NEPA nor the NRCA had any obligation to consult with citizens before granting a permit, therefore, they were under no obligation to consult or meet. In Mr Knight's affidavit filed 3 December 2018, he pointed out that applications for environmental permits are received and processed by NEPA after which they are sent to the NRCA for approval. On 11 May 2018, Mr Young wrote to Mr Knight requesting a meeting prior to the NRCA's board meeting of 15 May 2018, at which WAMH's application for permits was to be considered. Mr Knight responded to Mr Young on 14 May 2018, agreeing to meet, but as it turned out, he could not do so due to "scheduling problems". Mr Knight was, therefore, the one who made the relevant promise in this case, as the CEO of NEPA. It is on this promise that the 1st to 10th respondents rely for their claim of legitimate expectation.

[391] I agree with the submissions of Ms Hall, on this issue, in their entirety. Mr Knight, as CEO of NEPA, could not bind NEPA's Board to honour his promise to meet, neither could he bind the Board of the NRCA, of which he was only a member, which was the ultimate decision-maker. Furthermore, taking a more simplistic approach, the fact that one person (and this is so regardless of his rank or title) agreed to meet with the 1st to 10th respondents to hear their grouses could not, in those circumstances, have afforded them any justiciable legitimate expectation to be heard before a decision to grant the environment permit was made by a body of persons, unless perhaps that one person held out that he had the authority to so bind the rest of that body (see **R v Monopolies and Mergers Commission and another, ex parte Argyll Group plc** [1986] 2 All ER 257,

at pages 264 to 265, cited by the KSAMC. In that case, it was held that where the function of a commission is to be performed by a group, the chairman of the commission, in the absence of statutory authority, had no power to act on behalf of the commission in the interim before the group was formed). It was for the group, and not the chairman or the commission as a whole, to investigate a reference and make a decision. See also the decision of the Privy Council in **Auburn Court Ltd v Kingston & St Andrew Corporation and Others** [2004] UKPC 11 on the issue of legitimate expectation, where it was held that the decision was that of the KSAC and not an individual official, therefore no legitimate expectation could flow from the promises made by the official.

[392] In any event, the learned judge was correct when she found that the objection by the 1st to 10th respondents was known and considered by the NRCA, as the minutes of the meeting held on 15 May 2018 showed. It was, therefore, a material consideration in the deliberations of the NRCA in coming to its decision to grant the environmental permit.

[393] The counter-notice of appeal would, therefore, fail and ought to be dismissed.

The fresh evidence application

[394] The 1st to 10th respondents filed a notice of application for court orders for permission to adduce fresh evidence, and for the notices of appeal filed by the appellants KSAMC, NEPA, and the NRCA, to be struck out. The basis for the application was that the 1st to 10th respondents' claim that the fresh evidence proved that the appeals were an abuse of the process of the court, that the KSAMC had lied to the court below, and that the permits granted to WAMH were, in any event, rendered void as a result of the breaches and could not be restored. This court heard both applications and refused them. The main reasons for the refusal was that the matters relied on by the 1st to 10th respondents as fresh evidence, as well as for the application to have the appeal struck out, were matters which, in the main, touched and concerned the activities of WAMH and the Strata Corporation incorporated under The Registration of Strata Act 1969, subsequent to the hearing before the learned judge on the claim as filed. It also included other matters and allegations of further breaches which were not before the court below,

and which were not connected to the matters before that court, nor considered by that court in reviewing the decisions taken by the appellants which had been raised in the 1st to 10th respondents' claim. None of the matters raised would have affected the outcome of the case below, neither did they provide a basis for striking out the appeals.

Conclusion

[395] The learned judge made orders at her discretion. This court does not lightly interfere with such orders. It will only do so in well-recognised circumstances, one of them being that there was a misunderstanding of the law or facts, which is shown to be demonstrably wrong. This is such a case.

[396] Having given the matter extensive thought, I have concluded that the appeal brought by the KSAMC ought to succeed in part. The appeal brought by NEPA and the NRCA ought to succeed. I would set aside orders 1, 2 and 4 of the orders of G Fraser J. I would propose a variation of the wide terms of order 3 to an order to compel the KSAMC to enforce compliance with the stop notice served on WAMH Development Limited on 9 October 2018 in respect of premises at 17 Birdsucker Drive, Kingston 8, in the parish of Saint Andrew, and to take such further enforcement actions it deems expedient, in accordance with the relevant laws, regulations, or orders governing the exercise of its authority. The counter-notice of appeal ought to be dismissed.

[397] I would propose that there be no order as to cost in the appeal brought by NEPA and the NRCA as well as in the court below. I would also propose that there be no order as to costs in the counter-notice of appeal. I would grant the 1st to 10th respondents 30% of their costs in the appeal brought by the KSAMC and in the court below. The costs to be agreed or taxed.

BROWN BECKFORD JA (AG)

[398] I have read, in draft, the comprehensive judgment of Edwards JA. I agree with her reasoning, conclusions and proposed orders. I have nothing further to add.

F WILLIAMS JA

ORDER

i) The KSAMC's appeal against the judgment and orders of G Fraser J made on 17 December 2020, is allowed in part.

ii) NEPA's and the NRCA's appeal against the judgment and orders of G Fraser J made on 17 December 2020, is allowed.

iii) The 1st to 10th respondents' counter-notice of appeal, filed on 8 February 2021, is dismissed.

iv) Orders 1, 2 and 4 of the orders of G Fraser J, made on 17 December 2020, are set aside.

v) Order 3 of the said orders of G Fraser J granting an order of *mandamus* against the KSAMC is varied to read as follows:

> Order of *mandamus* to compel the KSAMC to enforce compliance with the stop notice served on WAMH Development Limited on 9 October 2018 in respect of premises at 17 Birdsucker Drive, Kingston 8, in the parish of Saint Andrew, and to take such further enforcement action as it deems necessary and expedient in accordance with the relevant laws, regulations, or orders governing the exercise of its authority.

vi) No orders as to costs in NEPA and the NRCA's appeal.

vii) No order as to costs in the 1st to 10th respondents counter-notice of appeal.

viii) The 1st to 10th respondents are entitled to 30% of their costs in the appeal brought by the KSAMC and in the court below, to be agreed or taxed.