[2022] JMSC Civ. 150

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU 2022 CV 00727

BETWEEN	**SONIA SMITH**	**APPLICANT**
AND	**DONOVAN MCKENZIE**	**APPLICANT**
AND	**JENNIFER WILLIAMS-LIVINGSTON**	**APPLICANT**
AND	**KINGSTON AND ST. ANDREW MUNICIPAL CORPORATION**	**FIRST RESPONDENT**
AND	**THE NATURAL RESOURCES CONSERVATION AUTHORITY**	**SECOND RESPONDENT**

IN CHAMBERS

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

Mrs. Rose Bennett-Cooper, Ms. Sidia Smith and Mrs. Keveine Clarke-Harris, instructed by Bennett – Cooper, Smith, for the first respondent

Mr. Stewart Panton and Ms. Tameka Menzie - In-house counsel, for the second respondent

Heard: July 22 and July 29, 2022

Application for leave to challenge environmental, planning and building permits granted by Kingston and St. Andrew Municipal Corporation - multi-family development - Grounds for application - Bias – Irrationality- Illegality- Natural Resources Conservation Authority Act- Building Act

ANDERSON, K.J

BACKGROUND

The history of this matter

[1] This is an application for leave to apply for judicial review which was filed on May 3, 2022.

[2] There is no dispute that said application was filed within time.

[3] There is no contention that adequate alternative means of redress are available to the applicants.

[4] The 2nd respondent is not opposing the application. As far as the 2nd respondent is concerned, with respect to this application, it is being contended by the applicants and has not, at least at anytime until now, been contended otherwise by the 2nd respondent, that the environmental permit which was granted to the developer, by bias and/or a conflict of interest, as its Deputy Director is also the developer's architect.

[5] The developer of the relevant properties is: VASS PROPERTIES & LOGISTICS Ltd. (VASS). The developer is in the process of constructing what has been described as a, 'multi-family development' on two lots – Lots Nos. 34A & 34B, which are respectively registered at Volume 1223, Folio 671 and Volume 1223, Folio 672 of the Register Book of Titles.

[6] Upon the court's hearings of the said application for leave, one Mr. Stephon Henry and Andrew Henry were then present as the representatives of VASS Properties and Logistics Ltd. I had ordered, on an earlier occasion, when this application for leave had also come before this court for hearing, that the application and all affidavit evidence in respect of same, were to be served on VASS. To the best of my knowledge, that was done.

[7] The lots referred to earlier, are respectively owned by Stephon and Shauntelle Henry – if the assertion made as to same, in correspondence attached to the affidavit of Xavier Chevannes, which was filed on May 6, 2022 and which is marked as exhibit, 'XC 2' is correct. That exhibit is a letter addressed to the Chief Executive Officer of the Kingston and St. Andrew Municipal Corporation – the 1st respondent, by nine purported residents of Chancery Close and its environs, each of whom, have purportedly signed that letter. Chancery Close is located in Kingston and St. Andrew.

[8] The applicants have alleged, through the affidavit evidence of the 1st applicant, that they respectively reside at Nos. 5 & 8A Chancery Close, Kingston 19 and also, at 45 Chancery Hall Drive, Kingston 19. According to the 1st applicant's affidavit evidence, they each have been living at those addresses for years now, each in a two storey, single family, detached home. They are each therefore, either neighbours or live within the environs of the proposed development, if their assertions as to their residential addresses, is both truthful and accurate. The respondents are not disputing that.

[9] There is also evidence before this court, which is undisputed, that Andrew Henry is a director and principal of VASS.

[10] It is alleged by the applicants in the 1st applicant's affidavit evidence, that lots 34A & 34B, make the combined area on which the proposed multi-family development is to be built, a total of 0.62 of an acre, which is of course therefore, approximately three/fifths of an acre. My simple, mathematical calculation, has determined that to be so. That combined area as alleged by the applicants, has not been disputed by the respondents.

[11] The 1st applicant has contended that there was building and planning permission – two separate permits, granted to the developer, by the 1st respondent. See paragraph 17 of the 1st applicant's affidavit evidence, deponed to, on the applicant's behalf, in that regard.

[12] The applicants have also, through the 1st applicant, contended that the 1st respondent is the local planning authority for Kingston & St. Andrew, as well as the Building Authority, under the Building Act. See paragraph 7 of her affidavit evidence, in that regard.

[13] In the aforementioned affidavit evidence of Xavier Chevannes, there is a site visit report dated May 4, 2022, which was prepared by one Mr. Norris Elliot, Field Inspector, employed to the 1st respondent. That site visit report is attached as an exhibit to the said affidavit and has been marked as exhibit, 'XC 4.'

[14] That report has revealed that a routine site inspection was conducted at the relevant location, to ascertain the status of construction. At that time, that inspection, according to that report, revealed that one of three blocks was then under construction. In that report, after having stated that, the following is also stated:

'*This block will host basement parking and apartment units on top. The construction was at ground floor level. The other two blocks will consist of town house units as per approval. The construction was in conformance with approved plans. Follow up inspection will ensue to ensure compliance*.'

[15] There is a letter which has been attached as an exhibit, to the affidavit evidence of the 1st applicant. That letter has been marked as exhibit, 'S.S.2.' That letter has been addressed to the 3rd applicant. It reads as follows:

'*Please note, further to your letter dated January 11, 2021, we have secured all approvals to facilitate commencement of construction project on lots 34A & 34B Chancery Close.*

Our estimated commencement date will be Tuesday, January 11, 2022. The duration of this project is expected to be 15 months from commencement date.

If you have any further questions you may contact us via our group email info@vassja.com.

Regards,

Signed Management'

[16] Based on the fact that the said letter appears to have been typed under the letterhead of VASS, this court has drawn the inference that construction and/or finishing work related to various aspects of the development project either is/are, or has/have been ongoing, for some months now and is/are expected to continue.

[17] The applicants are seeking a stay of the permits granted by the respondents. There is no dispute that the 2nd respondent has granted an environmental permit to VASS, re the development of the apartments and townhouses.

[18] If leave is granted therefore, in respect of the application against the 2nd respondent, the applicants are seeking a stay of that environmental permit, that was granted by the 2nd respondent.

[19] Counsel for the applicants, Mr. Gavin Goffe, has submitted, in his oral submissions, that the environmental permit**,** is the precursor to the planning permit and that the planning permit is the precursor to the building permit and that it must follow, that the permits to be granted, in respect of a development such as the one which is at the center of the dispute, which is at the heart of the present application, have to be granted in that order. The 1st respondent's lead counsel, has strongly disputed that particular contention and in fact, has strongly disputed all of the applicants' primary grounds, which I will venture to suggest, are grounds 1 to 4 of the grounds in support of the disputed application.

[20] Ground 5 pertains to bias on the part of the Deputy Chairman of the 2nd respondent. Having earlier referred to that ground with a bit more specificity, I will not refer to same again, expect to the extent that I will state that bias on the part of a decision-

maker, will serve, in administrative law, to utterly vitiate that decision-maker's decision. The merits of that decision will be of no moment. Bias, or at the very least, a reasonable apprehension of bias, on the part of a decision–maker, will be considered as being a breach of natural justice, in respect of that decision. That decision will be considered by a court, in this jurisdiction, as being void. That is so, regardless of whatever may be the merits of that decision.

See in that regard: **Dimes v Grand Junction Canal – 3 HLC 759, esp. at 793, per Ld. Campbell, Allinson v General Medical Council (1894) 1 QB 750 and General Medical Council v Spackman (1943) AC 627.**

[21] There is no dispute between either of the parties, or for that matter, between them and the court, that as regards an application for leave to apply for judicial review, in order for such an application to be successful, the applicant must show that he, she or it, has an arguable case, with a realistic prospect of success.
See**: Sharma v Brown-Antoine & ors – (2007) 1 WLR 780.**

[22] On the unchallenged evidence presented, as regards the applicants' challenge to the environmental permit as granted by the 2nd respondent, the applicants ought to be and will be granted leave to challenge the grant of that particular permit.

[23] **Rule 56.4 (9) of the C.P.R** requires the court to consider whether the grant of that leave, operates as a stay. I think that it would be pointless, if it did not operate as a stay, since otherwise, by the time that the application is filed, in the form of a claim before this court and that claim is actually tried and adjudicated on, with a verdict of this court, upon that claim, being rendered, it is very likely that the challenged development will, by then, already have been completed.

[24] I had therefore, enquired of both counsel, who made oral submissions to the court, during the leave application hearing, whether, if leave is granted to the applicants as against the 2nd respondent, leave should also be granted to the applicants as against the 1st respondent. In that regard, the applicant's counsel has stated that

the same should be so, whereas, the lead counsel for the 1st respondent has submitted that it should not be so.

[25] If the environmental permit is a prerequisite for the other permits to be granted, therefore, as is vigorously disputed between the parties' counsel, then it inexorably follows, that the permits such as the planning and building permits, may also now be successfully challenged, on the basis that there were likely, unlawfully granted.

[26] It is the considered conclusion of this court, that whilst there exists in law, no specified order of priority in time, as between the need to obtain a building permit and a planning permit, in order to carry out building work, under and in accordance with the provisions of the **Building Act, 2018**, there is, on the other hand, within the context of the factual substratum surrounding the application which is now under consideration by this court, a priority in terms of, not only time, but also, necessary occurrence, between the grant of, or specification of an intention to grant, an environmental permit for a development such as the one which is now, under consideration, by the NRCA and also the grant of the required building and planning permits.

[27] That this is so, is to my mind, made clear from a careful reading of **sections 17(1) of the Building Act, 2018 and 11 (1) & (1A) of the Town and Country Planning Act** and also, on a careful consideration of both of those Acts of Parliament as a whole. I will now quote **section 17 (1) (a) & (b)**, as those are the portions of that section and sub-sections of the **Building Act, 2018**, which are relevant, for the purpose of this important point. I will then go on to quote the entirety of **section 11 (1) & (1A) of the Town and Country Planning Act**.

[28] Before doing so though, I must state that there is no dispute between the parties and rightly so, that the relevant development falls within the ambit of the definition of 'building work,' as contained in **The Building Act, 2018**.

[29] **Section 17 (1)**: *'A person shall not carry out building work unless-*

(a) a building permit in respect of the building work has been issued to him;

(b) where applicable, a planning permit has been issued to him under the Town and Country Planning Act.'

[30] It is also, it should be noted, not disputed between the parties and also, rightly so, that a planning permit was required for the relevant development and ultimately, that VASS obtained a planning permit and a building permit from the 1st respondent and also, an environmental permit from the 2nd respondent**.**

[31] I will reiterate, before going on to quote **section 11 (1) and (1A) of the Town & Country Planning Act**, that it is my considered opinion that the grant of an environmental permit, or alternatively, the specification by the 2nd respondent that it intended to grant an environmental permit to VASS, related to the development that VASS then intended to construct on the relevant land parcels, was a prerequisite for the grant to VASS, by the 1st respondent, of the required, building and planning permits. I have so concluded, because of the express wording of **section 11 (1A) (b)**, in particular. For the purpose of a better understanding of that particular provision though, I think it best to quote the entirety of **section 11 (1) and (1A)**. That quotation therefore, now follows: Section 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.

(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

(b)

been made as required by such provisions as foresaid; and

(c) that Authority has granted or has signified in writing its intention to grant, a permit under that Act.'

[32] There is no doubt that the permit referred to, in **section 11 (1A) (b)** of **the Town and Country Planning Act,** is an environmental permit. See **section 9 of the NRCA Act**, in that regard**.**

[33] In paragraph 14 of her affidavit on behalf of the applicants the 1st applicant has deponed to an allegation which has not been disputed in any way, by either of the respondents. That undisputed allegation is as follows: 'On the 30th of November, 2021, the National Environment and Planning Agency (NEPA) sent its recommendation to the 1st respondent that VASS' development application be approved. I understand that this is an indication that the 2nd respondent had granted, or would soon grant, an environmental permit in respect of the permits.'

[34] There has been attached as an exhibit to that affidavit of the 1st applicant, a letter which, on the face of it, appears to have the signature of someone on behalf of VASS, as that letter is written with the letterhead of VASS thereon and the signature that is on that letter is above a line, under which, the words, '*Signed Management*' are written.

[35] That letter specifies that '*we have secured all approvals to facilitate commencement of construction project on lots 34A and 34B Chancery Close*.' That letter is dated January 10, 2022 and specifies therein that the estimated commencement date will be January 11, 2022 and the duration of the project is estimated to be fifteen months from the commencement date.

[36] No evidence has been given by anyone, or on behalf of any party, with respect to the present application, as to exactly when it was, that the respective building and planning permits were granted by the 1st respondent. It must follow logically though, from my conclusion as set out above, that at a later stage of court proceedings related to any claim for judicial review relief that may hereafter be pursed, following on the present application, that the dates when the respective permits were each granted, must be a relevant consideration, within the context of any such, possible claim. For present purposes though, that will be of no particular significance.

[37] What is though, undoubtedly of significance for present purposes, is that since, as earlier stated, leave will be granted to the applicants to pursue the relief as sought, as against the second respondent on the ground that the second respondent's grant of an environmental permit to VASS pertaining to the relevant development was a determination that was made, in breach of natural justice, in so far as the same is tainted by, at the very least, the appearance of bias, if not, actual bias and since, this court has concluded that the grant of an environmental permit, or at the very least, the expression by the 2nd respondent, of its willingness to grant an environmental permit in order to allow for the relevant development to be carried out, in compliance with the relevant provisions of the NRCA Act, was a prerequisite for the grant of the building and planning permits which the 1st respondent granted, then naturally, those permits must be stayed, the development must be stayed and leave to pursue a claim in respect of those permits, being the building and planning permits, must also be granted.

[38] That must be so, since the environmental permit, on the one hand and the building and planning permits on the other hand, are not only, inextricably intertwined such that they cannot properly be and ought not to be treated as if they occur and /or operate exclusively, in separate silohs, but also because the former-mentioned permit, is a prerequisite for the other permits. In having reached that conclusion, I wish to expressly adopt the reasoning of my sister judge on this court, as she then was, that being G. Fraser, J. in the case of **Michael Young & ors. and K.S.A.M.C. & ors. (2020) JMSC Civ 251**, esp. at paragraphs 9 -116. If therefore, upon a claim for judicial review, the environmental permit or intention to permit, is successfully challenged then it is, in my view, axiomatic that the other permits cannot stand. They are, to use a crude analogy, like the windows of a house. If there is nothing to hold them up, they cannot be utilized for their intended purpose (s). The fact that one of those permits - the environmental permit, is granted by a different agency of government, than the agency of government, albeit, local government - being the K.S.A.M.C., which grants the building and planning permits, does not extract either of those permits, from the inextricable intertwining that they are collectively subject to, under applicable law, as regards a development such as is now under construction by VASS – that being the one in respect of which, the permits for same are being challenged, by the applicants.

[39] That though, is still not the end of this court's consideration of the present application.

[40] In that vein, this court has noticed that whilst the applicants have, through the affidavit evidence of the 1st applicant, averred that they did not receive from VASS, any notice of their intention to submit plans or to commence building work, the applicants have not, in their grounds which they were required to, by law and did set out, as the bases for this application for leave, specified that any such alleged failure to give notice to them, constitutes one of the plinths upon which they have chosen to rest, their present application.

[41] In the circumstances, this court does not believe it either, to be necessary or appropriate, to address same, any further. It is also worthwhile mentioning, in credit to the respective counsel who presented oral submissions to this court, upon the present application, that in the limited time that was available to each of them, to make oral submissions, quite sensibly, neither of them, addressed me as regards same, at all.

[42] It is worthwhile therefore, at this stage, to set out the four main grounds remaining to be addressed by this court, as the bases put forward to this court, upon which, in the view of the applicants, leave to apply for judicial review, ought to be granted to them. I think it best, for present purposes, to set out same, precisely.

[43] *Those grounds are as follows:*

'1. The Respondents' decisions to grant the permits are irrational as they failed to give due consideration or effect to the Town and Country Planning (Kingston & St. Andrew and the Pedro Cays) Provisional Development Order, 2017, which prohibits multi-family developments on plots of land that are less than 1 acre.

2. The Respondents' decisions to grant the permits are irrational as they failed to give due consideration or effect to the fact that the proposed development would exceed the maximum density under the Town and Country Planning (Kingston & St. Andrew and the Pedro Cays) Provisional Development Order, 2017, by more than 100%.

3. No compelling reasons have been shown to the Respondents or may be shown to grant the permits in spite of the non-compliance with the provisions of the Town and Country Planning (Kingston & St. Andrew and the Pedro Cays) Provisional Development Order, 2017.

4. The 1st Respondent acted illegally, and in breach of Section 12 (1A) of the Town and Country Planning Act by failing to refer to the Town and Country Planning

Authority the application for planning and building permission that does not conform to the Development Order for the area.'

[44] Upon a careful consideration of each of those grounds, three things in particular, are apparent, which are that, firstly, grounds one to three pertain to both respondents and secondly, ground four, pertains only to the 1st respondent. Thirdly, each of those grounds are essentially contending that the respondents collectively, or the 1st respondent solely, acted either irrationally, or illegally, in so far as there were respective permits granted for the said, 'multi-family development,' which were granted in violation of the legal requirements that are applicable to any development such as that, those being the legal requirements which form part of either **The Town and Country Planning (Kingston & St. Andrew and the Pedro Cays) Provisional Development Order, 2017,** or **section 12 (1A)** of **The Town and Country Planning Act**, read necessarily, albeit only by implication, with the said, Provisional Development Order.

[45] It is worthy of careful note at this stage of this court's reasoning, that in respect of each of those grounds as are being pursued by the applicants, the burden of proof, in respect of an application such as this, rests solely on the applicant's shoulders. They are the ones who therefore, if they are to be successful upon the application which is now under consideration by this court, need to satisfy this court to the requisite standard, that being, on a balance of probabilities, that either or all of those grounds, constitute(s) arguable ground(s) with a realistic prospect of success, if a claim for judicial review is thereafter pursed, on either or all of those grounds.

[46] The essence of the 1st respondent's response to this application and the grounds upon which the same has been based, as against them, is that the applicant's grounds one to four must fail, since they wrongly assume that the relevant development order, whether provisional or final in nature, which applies with respect to any development such as the one which is now ongoing and which is at

the center of this application, is **The Town and Country Planning (Kingston & St. Andrew and the Pedro Cays) Provisional Development Order, 2017**.

[47] The 1st respondent's contention though, is to the contrary. They have instead, contended, that the applicable Development Order for Kingston & St. Andrew is instead: **The Town and Country Planning (Kingston) Development Order, 1966** and founded upon that premise, have further contended, that the said 1966 Development Order for Kingston, does not contain within it, any of the stipulations as contended for, under grounds 1 & 2 of the applicant's stipulated grounds for this application, in particular.To put it as simply as possible, the applicants' application is founded upon a false premise and therefore, is unable to withstand the test of careful, legal scrutiny, such as this court has been tasked to embark upon, in adjudicating upon the present application.

[48] Whilst three of those four main grounds for the present application relate to alleged irrational actions on the part of both respondents and of course, it ought always to be recalled, as this court has done, that the 2nd respondent has not opposed the application under consideration. To my mind though, that does not mean that the said application ought to be granted as against either of the respondents, or both of them.

[49] It is the applicants who have the burden of proof, not the respondents. Failure to object or oppose a particular ground for desired action by this court, does not mean that the court must, or even, ought, to take such action. If that were so, then it would mean that this court would have ceded that which ought to be the exercise of its judicial discretion, to counsel for the parties, who have exercised their discretion as regards matters which fall within this court's jurisdiction.

[50] It must though, be explicitly stated at this juncture, that I did not read or hear either of the parties' counsel, in either their respective written or oral submissions, submit any contention to the contrary.

[51] Of course though, it does not at all follow that if this court is minded to permit the applicants to pursue a claim for judicial review against either of the respondents on grounds 1-3 as above – quoted, then this court must also do so, with respect to the other respondent. I will therefore, shortly hereafter, proceed to consider grounds 1-3 collectively, whereafter, I will then go on to consider ground 4, separately, but that is only because, ground 4 relates only to the 1st respondent. In reality though, if the first three grounds lack merit, or are meritorious, then the same must be the case, with respect to ground 4, since ground 4 implicitly and necessarily, is founded upon the premise that the wrong Development Order for the relevant location of the now ongoing development, was relied on, by the first respondent, since the 1st respondent did not rely on **The Town and Country Planning (Kingston & St. Andrew and the Pedro Cays) Provisional Development Order, 2017**, failed to apply some of the specified, allegedly relevant, provisions of same.

[52] Before addressing those four grounds any further though, I feel constrained to state that, in so far as the grant of the building permit to VASS is concerned, the references made by the respective counsel that prepared and submitted to this court, written submissions and who made, oral submissions, were not, to my mind, particularly helpful, for present purposes**.**

[53] To my mind, the same were not helpful, because they each failed to address the court on the most important provision, for present purposes, of the **Building Act**, which actually, impacts directly, on the building permit, which was admittedly, granted by the 1st respondent, to the K.S.A.M.C.

[54] I will state just one example of that, which to my mind, exemplifies that point, albeit only with reference to counsel for one of the parties. I mean no disrespect to that counsel, by referencing same. Said example is that, during oral submissions, lead counsel for the 1st respondent had, on more than one occasion, specified that there is no challenge by the applicants, to the building permit.

[55] A careful reading of Order No.1 of the orders being sought by the applicants, on the present application, will reveal, that the said assertion is entirely incorrect. That desired order, as now quoted, reads as follows, *'Permission is granted to the Applicant to apply for an order or certiorari to quash the 1st Respondent's building and planning permission granted to VASS Properties & Logistics Limited to erect a multi-family development at 34A & 34B Chancery Close, Kingston 19, in the Parish of Saint Andrew.'*

[56] The grounds as quoted above, which are the primary grounds for the orders being sought by the applicants, have not, even to the extent of an iota, made any reference whatsoever, either to the **Building Act, 2018**, or to any ground upon which specifically, the grant of the building permit, is being challenged. Instead, those grounds specify the respective bases upon which the planning permit is being challenged.

[57] I must reiterate however, that the environmental, planning and building permits, in respect of a development such as the one which VASS is now constructing, are inextricably intertwined.

[58] Under **section 17 of the Building Act, 2018**, it is actually a criminal offence, to carry out. '*building work*,' as that just quoted term, is defined by that Act, without first having obtained a building permit and a planning permit, or to carry out that, '*building work*,' otherwise then as prescribed by that building permit.

[59] It is therefore, axiomatic, that if the planning permit is permitted by this court, on the present application, is to be challenged by means of a judicial review claim, such that the same may be brought into this court and quashed – which is precisely, just one of the reliefs that the applicants are now seeking this court's leave to pursue, then, the building permit which was granted to VASS, by the 1st respondent, will also have to be quashed. That is so, because, the building and planning permits are inextricably intertwined, as too, is the environmental permit, with the only difference between the manner in which they are intertwined, being

that the environmental permit must be obtained, prior to the building and planning permits being obtained, once it is, as is the case here, that the obtaining of an environmental permit, is necessary.

[60] Having now made that clear, I will return to addressing grounds one to four of the applicants' stipulated grounds for the present application. The affidavit evidence given by one of the 1st respondent's witnesses, namely: Xavier Chevannes, will not, for that purpose, be helpful. He has, on affidavit, deponed that he has been employed as the City Engineer since as of April 8, 2021. Prior to that, he was the Deputy Superintendent, which position is deputy to the City Engineer. In that capacity, according to that which he was deponed to, he makes recommendation to the Building and Town Planning Committee, for approval, or approval with conditions, or refusal of each application made to the 1st respondent, for building permission. He also has responsibility for post-approval monitoring, to ensure compliance with building permits granted by the 1st respondent.

[61] Grounds one to four of the applicants' grounds, in support of their present application, concern matters relevant to the grant of planning permission, or in other words, a planning permit, to VASS, re their intended construction of a multi-family development, at Chancery Close. In the circumstances, I did not find Mr. Chevannes' evidence, to be of any assistance to this court, in that regard. On the other hand though, the evidence given by Ms. Andrine Mclaren, who has deponed to affidavit evidence, specifying that she has been the Director of Planning, employed by the 1st respondent, since 2007, was of assistance.

[62] According to her evidence, as Director of Planning, her responsibilities include, among other things, *'assessing and reviewing applications for planning permission to develop land, to determine and make recommendations on whether planning permission ought to be granted unconditionally, subject to conditions, or refused. As such, I routinely review applications to develop land to construct multi-family dwelling as well as supervise Planning Officers within my department who assess such applications.' (Paragraph 5)*

[63] Before making, any further reference to Ms. Mclaren's evidence, it is necessary to understand the legal underpinnings of grounds one to four of the applicants' grounds, for the present application. Grounds 1 and 2 allege irrationality, on the part of the respondents, in the grant of the relevant permits. What then, is irrationality on the part of a public authority, as a matter of law? It is, to put it as simply as possible, a decision on a matter which has been determined by that public authority, which is so unreasonable, that no reasonably authority could ever have made that decision. If that is so, but only if that is so, can said decision properly be considered by a court in this jurisdiction, as being, 'irrational.' It is not whether this court thinks that the pertinent decision is an unreasonable one. That is altogether, a different thing. This court is not, for the purposes of a judicial review application, going to substitute its view(s) as to that which is reasonable, for the view(s) of that public authority, that has the pertinent expertise and experience in that particular field of work and which, moreover, Parliament has entrusted with that particular responsibility. The effect of the legislation would be that it is the statutory established authority, that is set in the position, to be the arbiter, of the correctness of one view, over the other, not this court, or any court, for that matter. Provided that the said authority, has acted within the four corners of its jurisdiction, this court cannot and will not, interfere. That is so, because, Parliament has entrusted that statutory authority, with the decision on a matter which the knowledge and experience of that authority, can best be trusted to deal with. See in that regard, the case**: Associated Provincial Picture Houses Limited v Wednesbury Corporation (1948) 1 K.B 223, esp.at page 230 and 231, per Ld. Greene, M.R.**, in reference to a, *'local authority*,' which was an entity established under the provisions of the **Cinematograph Act, 1909**.

[64] Thus, as was stated by **Ld. Browne-Wilkinson in: R v Lord President of the Privy Council, ex p. Page (1993) AC 682, at page 701** – '*If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is Wednesbury unreasonable, he is acting ultra vires his*

powers and therefore unlawfully. *See: Wade, Administrative Law, 6th ed. (1988), p. 39.'*

[65] Grounds 3 & 4, pertain to my mind, to alleged illegality, on the part of the 1st respondent, in respect of ground 4 and both respondents, in respect of ground 3. Essentially, the applicants are contending that the respondents, in respect of ground 3 and the 1st respondent, in respect of ground 4, have\has acted, 'ultra vires.' In other words, it is being alleged that they acted outside of their power, or authority. The learned author – Professor, Dr. Albert Fiadjoe, in his text Commonwealth Caribbean Public Law, 3rd ed. (2008), at pages 29 to 33, refers in some detail, to both substantive and procedural, ultra vires. The former occurs when a public authority does something which is not authorized by statute. As he states in that text, *'Put simply, a public authority that has been granted powers, whether by constitution, statute of some other instrument, must not exceed the powers so granted. It will be taken to have exceeded its powers if it has done or decided to do an act that it does not have the legal capacity to do.'* See: **Tappin v Lucas (1973) 20 WIR 229**. Procedural ultra vires occurs when a public authority fails to follow procedure laid down by the law. If a statutory authority acts outside of the scope of its statutory powers, or without complying with the statutory procedures that may govern it, in the exercise of its statutory powers, then it will always be open to this court, in exercise of its discretion, following upon a claim for judicial review, challenging that statutory authority's exercise of its statutory powers, to quash the decisions reached, as a consequence of that exercise.

[66] Applying that understanding to the factual substratum of the matter now at hand, a few things must be carefully noted. Among those, is that it is not the NRCA (the 2nd respondent), that is responsible for the grant of planning permission. Planning permission is granted by the Council of the K.S.A.M.C. and in that regard, it is the Planning Department of the K.S.A.M.C. as headed for many years, until now, by Ms. Mclaren that plays the lead role. The only permit which was granted to VASS, by the 2nd respondent, is an environmental permit. By law, that particular permit, in circumstances wherein a developer of structures/buildings, or a building on land,

is, as already stated in these reasons, required to obtain same, must be obtained, before any planning or building permit, or both a planning and a building permit, can lawfully be obtained.

[67] Accordingly, it is not the 2nd respondent that would have had any legal responsibility whatsoever, to ensure that there was compliance with the provisions of **The Town and Country Planning (Kingston and Saint Andrew and the Pedro Cays) Provisional Development Order, 2017**. Furthermore, the 2nd respondent could not have acted irrationally in having allegedly failed to consider and apply, particular provisions of that **Provisional Development Order, 2017**.

[68] In the circumstances, the application for leave to apply for judicial review of the alleged, 'grant of permits,' by the second respondent must and does fail. Only one permit was granted by the 2nd respondent, or at the very least, only one decision was made by the 2nd respondent to grant any permit to VASS and that was in respect of the environmental permit.

[69] Furthermore, the 2nd respondent was not obliged to act within the ambit of either **The Town & Country Planning Act**, or the relevant **Provisional Development Order, 2017**, in deciding as to whether or not, that environmental permit, was to have been granted. Whilst the three permits are inextricably intertwined, each statutory authority that had to decide on whether those permits ought to have been granted and if so, under what terms and conditions, needed to have acted in that regard, only in accordance with their respective statutorily established, authority. In respect of the matter now at hand, there are three different permits under careful consideration. Each of those permits, was required to have been decided upon, by the relevant statutory authority, on their own, respective, independent merits or otherwise and only within the context of the applicable law, as regards each of same.

[70] Grounds 1 to 3 of the present application therefore, will not be permitted by this court, as against the 2nd respondent. The 2nd respondent's grant of, or their

specification of an intention to grant, an environmental permit to VASS, will be permitted to be challenged on the ground of appearance of bias, or actual bias, as specified in ground 5. Grounds 1 to 3, in respect of the 2nd respondent, are not in my considered view, arguably, grounds which either independently or collectively, have any realistic prospect of success, within a judicial review context. The fact that the 2nd respondent has not opposed, the grant of leave to the applicants, on either of those first three grounds, cannot and does not, serve to change that.

[71] All of those grounds though, still must be carefully considered and decided on by this court now, in respect of the application for leave to apply for judicial review, which has been made against the 1st respondent.

[72] In that regard, I have found that a careful consideration of **The Town & Country Planning Act**, **The Town and Country Planning (Kingston) Development Order, 1966** and **The Town and Country Planning (Kingston & Saint Andrew and The Pedro Cays) Provisional Development Order, 2017** and also the judgment of my sister judge (as she then was), in this court in the earlier cited case of **Michael Young & Ors. And K.S.A.M.C. & Ors. (op.cit)**, in particular, but not exclusively, have proven to be very useful, for present purposes.

[73] My consideration of the same has, firstly, led me to the arguable conclusion, which I believe, has a realistic prospect of success, that the interim development order, 2017, for Kingston & St. Andrew and the Pedro Cays, was actually intended to replace the confirmed **Development Order for Kingston & St. Andrew, 1966**. The wording of **section 4A (1) of The Town and Country Planning Act**, has led me to that arguable conclusion. **Section 4 A (1**) specifies that – ***'The Minister may, after consultation with a local authority, make an order to be known as interim development order in respect of any land which is not the subject of a confirmed development order other than land to which a Town and Country Planning (filling station) Development Order relates.'*** (Portion highlighted for emphasis)

[74] To my mind therefore, the parent legislation for the relevant confirmed Development Order and the interim Development Order, does not properly contemplate or expect that both of same, will exist and\or be applicable, simultaneously.

[75] Within that context, the maximum: 'leges posteriores priores contrarias abrogant' (later laws abrogate earlier contrary laws) may very well, be applicable. The classic statement of the test for implied repeal was set out by A.L. Smith,J. in **West Ham (Church Wardens etc.) v Fourth City Mutual Building Society (1892) 1 QB 654, at 658** – 'The test of whether there has been a repeal by implication by subsequent legislation is this: Are the provisions of a later Act so inconsistent with, or repugnant to, the provisions of an earlier Act that the two cannot stand together? 'See an example of that, in **R v Davis (1783) 1 Leach 271**.

[76] Of course, Development Orders, whether confirmed or interim in nature, have the same purpose and fall within the ambit of that which is known as subsidiary legislation, such as regulations made by a Minister of government, pursuant to statutory provisions. The purpose of any Development Order is to regulate and properly manage, the development of the particular parish in Jamaica, to which same relates. An interim Development Order is a precursor to a confirmed Development Order. **Sections 5 to 7 of The Town and Country Planning Act**, specify the process to be followed in moving an interim development order from that stage, to the stage wherein it becomes a confirmed development order. That process is to be initiated by the Town and Country Planning Authority, once there has been expiration of the period during which notice of objection to that Interim/Provisional Development Order, may be given, pursuant to **section 6** of the said Act.

[77] There is, this court has noted though, a general presumption against implied repeal. The strength of that presumption against implied repeal, varies according to the context. See: **BH(AP) v Lord Advocate (2012) UKSC 24 at (30)**. The effect

of that presumption is that courts should, where possible, interpret the provisions of a later Act, in a way that is compatible with the earlier one.

[78] What is very clear to this court, within the context of the present application and the factual substratum surrounding it, is that whilst Ms. Andrine Mclaren has given evidence, suggesting essentially, that that is the approach which she and those who fall within her purview, as planning officers employed by the first respondent, have taken, at least at first glance, the results do not appear to match the rhetoric. Thus, she has deponed, at paragraph 9 of her affidavit, that: '*The confirmed Development Order set out the objectives and policies which, may guide development in the parishes of Kingston & St. Andrew and the Pedro Cays with a view to ensuring that the best use is made of land in the interest of the community of the limited amount of land available and the preservation of amenities. However, the weight accorded to the terms of each order in the assessment process is determined on a case-by-case basis and the K.S.A.M.C. is not required to follow either document strictly*.' In paragraph 23 of her said affidavit though, Ms. Mclaren has given evidence under oath, or in other words, deponed, that, '**As previously stated however, the Provisional Development Order has no legal effect and as such, the K.S.A.M.C. is not bound by its provisions.' (Highlighted for emphasis)** Just before that though, in that same paragraph of her affidavit, the said Ms. Mclaren has also deponed that *'… it is admitted that the Provisional Development Order is a material consideration which is taken into account by the K.S.A.M.C when assessing applications for planning permission as alleged at paragraph 15 of the Applicants' affidavit.*' It is, to my mind, difficult to reconcile those two seemingly contrary, quoted assertions in that single paragraph of the same affidavit, which was the only affidavit deponed to, by the said Ms. Mclaren.

[79] There is a live question now at hand therefore, as to whether the 1st respondent paid due regard to the relevant, in fact, as rightly suggested by the said Ms. Mclaren herself, in paragraph 23 of her affidavit evidence, 'material consideration' as to the stipulations in the relevant Interim/Provisional Development Order, that

would have been proposed by VASS, which was then under consideration by her and others under her direction, at the Director of Planning at the K.S.A.M.C.

[80] This court is not now, called upon to decide as to whether the 1st respondent acted irrationally as alleged, or not. What this court has been called upon to decide, at this stage, is whether, on the alleged grounds of irrationality on the part of the 1st respondent, the applicants have an arguable case, with a realistic prospect of success. Equally so, as regards the alleged errors of law, on the part of the 1st respondent.

[81] It would be inappropriate, at this stage, to examine grounds 1-4 for the present application in too much detail and therefore, I have been circumspectly careful, in setting out those reasons, to avoid doing so. To do otherwise would be inappropriate, because leave will be granted and therefore, assuming that all things will remain as they should, the claim which is expected to be filed, will later have to be adjudicated on, by this court. No comment or expression of mine herein, is to be considered as binding on any other judge of this court and I am prepared to assume that other judges of this court, will apply that. I wish though, to avoid the danger of creating, in the mind of any future judicial adjudicator in respect of any future claim that may arise from this matter, any unconscious bias.

[82] I am of the view that the weight to be given to the confirmed Development Order, the Provisional Development Order and any other material consideration, would ordinarily have been matters for the relevant planning authority. It is always open to this court though, to consider whether, when looked at as a whole, the relevant planning authority's decision, was either an irrational or unlawful one.

[83] In respect of the matter now at hand, it must be, either that the relevant **Interim/Provisional Development Order** supersedes the **Confirmed Development Order**, to the extent whereby the same has been impliedly repealed, or alternatively, if both the **Provisional/Interim Development Order** and the **Confirmed Development Order** should be read together, in such a

manner as to be, as far as possible, harmonious with each other, there is still a very live issue in this case, as to whether far too much weight was afforded to the confirmed development Order, 1966, over and above the **Provisional/Interim Development Order**, **2017**.

[84] This court has noted that none of the provisions of the interim/provisional Development Order, in respect of which grounds for the present application have been placed before this court, were complied with, even in the slightest. It is, to my mind, arguable, with a realistic prospect of success, that at the very least, not enough weight and at worst, that no weight at all, was given by the 1st respondent to any of the provisions referred to, in either of those grounds.

[85] I am furthermore, persuaded by the reasoning of G. Fraser, J. (as she then was), in the **Michael Young case** (op.cit), at paragraphs 178 & 179 of her judgement in that case.

[86] In the circumstances, leave to apply for judicial review against the 1st respondent, on the grounds as specified in the present application, will also be permitted**.**

[87] Accordingly, a stay of all of the permits granted, pertaining to the challenged development, will also be ordered. I have concluded that Mrs. Bennett-Cooper's bold contention that if a stay is ordered, then the applicants should be required to give an undertaking as to damages, is entirely without merit, or precedent.

[88] It would be remiss of me though, if I were not to, before making my orders, specifically state that it is most unfortunate, to put it as kindly as I can, that the relevant provisional Development Order, has not yet been confirmed, nor has it been made known to this court, as to when same is expected to be confirmed. The Town and Country Planning Authority, acting in consultation with the K.S.A.M.C. needs to move that process forward and should inform the public that they are doing so. Good governance, I think, demands that and at the very least, expects that.

Orders

1. The applicants are granted leave to apply for judicial review of the 1st respondents' decisions to grant building and planning permits to VASS Properties & Logistics Ltd. ('VASS') in respect of a multi-family development now being developed at 34A & 34B Chancery Close, in the parish of St. Andrew, on the grounds as specified in their application for leave to apply for judicial review, which was filed on May 3, 2022.

2. The applicants are granted leave to apply for judicial review of the environmental permit granted to VASS, by the 2nd respondent, on the ground of actual or apparent bias and as specified in grounds 5, 6, 7 & 8 of their application for leave to apply for leave to apply for judicial review, which was filed on March 3, 2022.

3. The environmental, planning building permits granted to VASS are stayed with immediate effect and within 14 days of today's date, all construction work being done on the multi-family development at Nos. 34A & 35 B Chancery Close, St. Andrew, is to cease.

4. Conditional upon a claim for judicial review being filed within the requisite time period, a first hearing of Fixed Date Claim Form is scheduled to be held before a judge in chambers on February 2, 2023 at 11:30 a.m. for one hour.

5. The costs of the said application shall be costs upon any future claim to be filed by the applicants.

6. The applicants shall file and serve this order and shall serve same on the respondents and on VASS and on the Town and Country Planning Authority and on the Minister of Local Government, c/o The Ministry of Local Government.

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Hon. K. Anderson, J.