In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2010: No. 336

TELECOMMUNICATIONS (WEST INDIES) LIMITED

(trading as Digicel Bermuda)

(2) MICHAEL MARKHAM

Appellants

-AND-

THE MINISTER OF ENVIRONMENT, PLANNING AND INFRASTRUCTURE

(Formerly The Minister Of Environment And Sports)

Respondent

JUDGMENT

(In Court)

Date of Hearing: April 18-19, 2011
Date of Judgment: April 29, 2011

Mr. Jan Woloniecki and Mr. Nathaniel Turner,
Attride-Stirling & Woloniecki, for the Appellants

Mr. M. Anthony Cottle, Attorney-General's Chambers,
for the Respondent

Introductory

1. The 1st Appellant ("Digicel") provides cellular phone services which require the erection of transmission towers in various parts of Bermuda. One such tower was erected on the 2nd Appellant's property in a residential area ("the Cellular Tower"), without planning permission. Retroactive planning permission was then sought by him. A neighbour objected to the adverse impact of the tower on his property. The Development Applications Board ("DAB") refused the application on March 31, 2010. The Appellants appealed to the Minister against this decision. The Inspector appointed to advise the Minister agreed with the DAB decision and the Minister refused the appeal on September 3, 2010. It is against this decision that the Appellants appeal to this Court on points of law.

2. There are essentially two main grounds of appeal, only the first of which was admittedly a pure point of law. Firstly, it is complained that the Minister erred in law in concluding that the Cellular Tower's erection constituted a breach of the prohibition on "*trade and business premises*" contained in paragraph 7 of the Knapton House Estate Zoning Order 1957 (Grounds 1 and 2). Secondly, it is complained that the Minister erred in law in concluding (in the alternative) that the Cellular Tower is in breach of the policy guidelines of the 2008 Draft Plan (Grounds 3-5). The Appellants' Notice of Motion dated October 4, 2010 seeks an order setting aside the Minister's decision and granting Digicel[1] planning permission for its Cellular Tower.

The Minister's Decision

3. The Minister's decision is evidenced by three key documents; first and foremost, a Ministry letter. However the latter refers to an Inspector's report and the Board's own initial decision letter. By letter dated 3rd September 2011 to the 2nd Appellant, the Permanent Secretary wrote as follows:

> "*…On behalf of the Minister of Environment and Sports, I refer to the above appeal and enclose a copy of the Inspector's report and recommendation dated 30th August 2010.*
>
> *The inspector considered this appeal by written representation following an unaccompanied site inspection on 16th August 2010.*
>
> *I confirm the Minister has reviewed the Inspector's report and agrees with his recommendation.*

[1] The 2nd Appellant is the formal Planning applicant.

Accordingly, it is the Minister's decision to dismiss the appeal, to uphold the decision of the Development Applications Board and to refuse planning permission for the reasons set out in the attached Inspector's report and the Board's decision letter dated 7th April 2010…"

4. The Board's decision letter dated April 7, 2010 stated in material part as follows:

"*Planning permission was refused for the following reason(s):*

1. *The proposal is contrary to Policy ZON.15(1), Chapter 3 of the Draft Bermuda Plan 2008 Planning Statement, in that the stricter provision of the Knapton House Estate Zoning Order precluding alteration of buildings so they may be used as trade or business premises, prevails.*
2. *The proposal is contrary to Policies DAB.3, Details of Planning, Chapter 4, and UTL.17(a) (Telecommunications Towers), Chapter 12, of the Draft Bermuda Plan 2008 Planning Statement in that there is a significant visual impact on the adjacent property at 36 Knapton Hill, Smiths Parish.*"

5. The Inspector's Report is a five-page long document which sets out clearly and logically the background to the application, the grounds for refusal, the various submissions made in support of and in opposition to the appeal and the conditions which should be imposed if the appeal were to be allowed and permission granted. These matters are followed by the Inspector's own findings and recommendation. The recommendation that the appeal to the Minister against the Board's refusal of the application is based on the following findings:

"***11.*** *My* ***Findings***

Having visited the site, it is clear that the visual impact of the facility varies quite significantly, depending on one's vantage point. In the immediate vicinity, visibility is limited due to changes in elevation, vegetation and lot size, whilst longer vistas are not unduly obtrusive…the colour and relative slenderness of the latticework tower and antennas mitigate such impacts. However, it is clear that the visual impact on the adjoining property to the west at 36 Knapton Hill is both significant and detrimental, so I disagree with the appellant on this count. With regard to the Knapton House Zoning Order, I find the appellant's argument that this has been misinterpreted, and his somewhat creative redefinition of the Order's key terminology, both contrived and unconvincing. Against this backdrop,

a very powerful case needs to be made for allowing the tower in this location. Whilst the appellant has demonstrated that there is insufficient signal coverage in the area, it has not been shown that this is the only viable site from which to address the problem… there may be others unencumbered by similar zoning restrictions. Meanwhile, it is instructive to note that a 23-foot tower was initially considered capable of meeting Digicel's needs, but this was replaced by a higher and more obtrusive 35 foot structure when enforcement proceedings were launched. I am not therefore persuaded by the appellant's case.

I am also reluctant to support an appellant that has shown such flagrant disregard for the planning process, not once but twice. To react to an enforcement notice by replacing the offending structure with a bigger one is both arrogant and provocative, and hardly likely to endear one to the authorities."

6. The key elements of the Inspector's findings are that (1) he finds that the Zoning Order applies to the Cellular Tower; (2) he finds that the Order impacts on the standard of proof the 2nd Appellant had to meet to justify the application; and (3) Digicel erected a more obtrusive structure after the enforcement proceedings had been commenced. Finding (2) seems to dilute the Board's decision on the impact of the Order, which decision appears to be based on the premise that the Zoning Order contains a mandatory prohibition on the erection of commercial structures. Finding (3) does not appear to be based on any issue which formed part of the Board's decision and which the Appellant's had an opportunity to address before the Minister made his decision. It seems self-evident that the Inspector does not in his Findings address the merits of the application on the hypothesis that the Zoning Order does not come into play.

7. The recommendations set out at the end of the Director of Planning's March 31, 2010 Board Report were clearly accepted by the Board. However, there is nothing in the body of the Report to suggest that the "significant visual impact" reason for refusing the application would have constituted a free-standing basis for refusal if the primary Zoning Order ground did not come into play. The relevant portion of the body of the Director' s Report is not expressed in such definitive terms:

> "*Policy DAB.3, Details of Planning, requires, similarly, that the Board consider the suitability of the site for use, and such elements as the overall appearance and visual impact of development in the context of its surroundings. While the use is classified as a utility and potentially suitable for any location, and the equipment itself is now deemed within the guidelines intended to protect the health and safety of those living and working in the area, this evaluation is site-specific. As noted, despite the dense vegetative*

screening in place around the facility compound, the tower and antennas are unquestionably visible from the adjacent property to the west. The tower/antenna's visibility from Knapton Hill and other properties varies; in the immediate vicinity, visibility is limited due to changes in elevation, vegetation and lot sizes. Clear longer views of the tower, as a vertical element amongst buildings, can be had from Knapton Hill and other roads. The light color and the relative slenderness of the latticework tower and the antennas mitigate in some measure the visibility of these long views."

8. These somewhat inconclusive ruminations about Policy DAB.3 are to be contrasted with the very unambiguous way in which the body of the Director's Board Report concludes its analysis of Policy ZON.15: "*…As such, the facility for which retrospective approval is sought is not allowed under the zoning order, and the Board is without authority to grant approval of it.*"

9. Having regard to the way in which the Minister's decision and the key documents upon which it was based are expressed, it was impossible to attach much weight at the outset to the respective submissions of counsel as to what relief would be appropriate if the Court found that the operative analysis of the effect of the Zoning Order was wrong. Mr. Woloniecki for the Appellant contended that if the Zoning Order did not apply, it was obvious that the only decision open to the Minister was to allow the appeal on its merits and grant the planning permission sought. Mr. Cottle for the Minister contended, on the other hand, that even if the Zoning Order did not apply, it was obvious that the Minister would have reached the same result and rejected the appeal on the "*significant visual impact on the adjacent property*" point alone. I find that it is clear beyond serious argument, based on the Appeal Record placed before this Court, that neither the Board nor the Minister fully considered whether the application should be allowed or refused in circumstances where the Zoning Order did not apply.

The construction of the Zoning Order

The crucial provisions of the Knapton House Estate, Zoning Order, Smiths Parish 1957

10. The Zoning Order was made under rule 28 of the now-repealed Building and Land Development (Control) Rules 1948. It was seemingly enacted to create a residential estate following the subdivision of the Knapton House Property. Similar Orders were apparently made in relation to similar estates in other parts of Bermuda between the early to mid-1950's and the mid-1960's. The key provision of the Order is the following:

"*7. No dwelling house or other building constructed on any lot of land shall be altered within the meaning of paragraph 2 (d) of rule 4 of the Building Rules so that it may be used as trade or business premises.*"

11. Paragraph 2(c) of the Order provides as follows:

> "*the expression 'building lot', 'building operation', 'dwelling house', and 'trade and business premises' have the meanings respectively assigned to them in the Building Rules.*"

12. The now-repealed Building Rules contain the definitions referenced in paragraph 2(c) of the Zoning Order. Rule 3(t) provides:

> "*the expression 'trade or business premises' means any building used as a shop, store, office, hotel, restaurant, café, bar, factory, workshop or other place within which persons are commonly employed or engaged in any trade, business or profession.*"

13. The Zoning Order contains an absolute prohibition on converting dwelling houses or other buildings into "*trade or business premises*". However, the main purpose of the Order is to (a) impose special requirements on applications for permission to build on the Estate (paragraph 4); and (b) limit any building to single dwelling houses (paragraph 5). However paragraph 5 is subject to the proviso that this shall not prevent "*the construction of buildings(including out-houses and private garages) appurtenant to any such building intended to be used as a dwelling house where those buildings are not intended to be used for a purpose involving human habitation*"(paragraph 6).

<u>The current status of the Zoning Order</u>

14. Mr. Cottle helpfully placed the legislative history before the Court. The Building Rules 1948 were originally made under section 4 of the Development of Land Act 1943. The 1943 Act and the Rules made under it were repealed by section 43 of the Development and Planning Act 1965. Section 38 (3) of the 1965 Act (as amended by Act No. 28: 1973) provides as follows:

> "*Any zoning order made under the Building and Land Development (Control) Rules 1948, shall continue to have effect subject to the provisions of this Act, any regulations thereunder and to any development plan.*"

15. The 1965 Act was apparently[2] repealed by section 80 of the Development and Planning Act 1974 ("the Act"). Section 75 of the Act now provides:

> "*75. Any zoning order made under the Building and Land Development (Control) Rules 1948, and in force on 3 August 1965 shall continue to have effect subject to the provisions of this Act, any regulations thereunder and to any development plan.*"

16. The Laws of Bermuda Online contains a 'LIST [1953 TO 1964] OF STATUTORY INSTRUMENTS MADE UNDER THE BUILDING AND LAND DEVELOPMENT (CONTROL) RULES 1948'. This List was placed before the Court by the Appellants' counsel. The Zoning Orders themselves do not appear to have formed part of either the 1971 or 1989 Law Revisions, perhaps explaining why they have not been expressly updated. Nevertheless, the terms of section 75 of the Act on its face requires anyone construing the Zoning Order to ascertain to what extent it has been repealed by implication by any conflicting provisions of "*the Act, any regulations made thereunder and… any development plan*".

Does repeal of 1948 Rules expressly repeal any definitions originally forming part of the Rules which are imported into the provisions of the Zoning Order?

17. Mr. Cottle's first answer to the Appellants' reliance upon the definition of "*trade or business premises*" imported into the Zoning Order from the 1948 Rules was to submit that since the Rules had been repealed it was no longer possible to refer to them. This was because section 18(3) of the Interpretation Act 1951 provides: "*Any reference to an Act or to a statutory instrument shall be construed as referring to that Act or statutory instrument as amended from time to time.*" I reject this submission for two principal reasons.

18. Firstly, there is nothing in the 1965 Act, which repealed the 1948 Rules while maintaining the Zoning Order in effect, which suggests a legislative intent to repeal all references in the Order to the repealed Rules. On the contrary, the only amendments made to the Zoning Order were those necessary to conform the terms of the Order to the 1965 Act and any regulations or development plan made under it. The Order must now be read in such a way as is consistent with the 1974 Act and any regulations or development plan.

[2] For reasons which may well be logistical the body of sections dealing with repeals are not reproduced in the consolidated version of the Laws of Bermuda. While repealing sections are available online in the annual version of acts passed for each year since 1993, the original versions of pre-1993 legislation are not presently available online. Nothing turned on this issue in the present case; the occasions when the substantive repeal provisions in pre-1993 legislation will be relevant are, perhaps, likely to be rare.

19. Secondly, the statutory rule of interpretation set out in section 18(3) of the Interpretation Act 1951 is simply a general rule which may be displaced by provisions such as those contained in section 75 of the Development and Planning Act 1974. Section 1 of the Interpretation Act provides as follows (emphasis added):

> "***Application of provisions of Act***
> *1 (1) Subject to this section, this Act shall have effect in relation to the interpretation and construction of every Act of the Legislature of Bermuda, whether enacted before or after 19 July 1951, and of every statutory instrument made, given or issued in Bermuda, whether made, given or issued before or after 19 July 1951—*
>
> *(a) so as to assign to any expression used in any such Act or in any such statutory instrument the meaning assigned to that expression by this Act; and*
>
> *(b) so as to apply in respect of any such Act or statutory instrument the rules of construction declared in this Act.*
>
> ***(2) Notwithstanding anything in subsection (1), any provision of this Act—***
>
> *(a) which assigns a particular meaning to any expression; or*
>
> ***(b) which applies a particular rule of construction**,*
>
> ***shall not have effect** so as to assign that meaning or, as the case may be, **so as to apply that rule of construction, in relation to any other Act or to any statutory instrument**—*
>
> ***(i) where there is in that other Act or statutory instrument any express provision to the contrary; or***
>
> ***(ii) where in that other Act or statutory instrument the context otherwise requires.***
>
> *(3) In this section 'statutory instrument' has the meaning given in section 2.*

20. The definitions imported into the Zoning Order from the 1948 Rules do not automatically fall away merely because the Rules in which they are contained are repealed. Having regard to the terms of the provisions in the 1965 Act which repealed the Rules while preserving the Order in effect, I find that the definitions in the Order will only potentially be amended or repealed to the extent that inconsistent definitions may be found in the Act or the 2008 Draft Plan.

Definitions in the Act and/or the 2008 Draft Plan

21. The Zoning Order (and, it appears, most if not all of the more than 30 other such Orders) contains four[3] definitions found in the 1948 Rules: (1) "*building lot*"; (2) "*building operation*"; (3) "*dwelling house*"; and (4) "*trade or business premises*". None of these precise terms are defined in the Act or the Draft 2008 Plan (subsequently approved as the Planning Statement 2008).

22. The term "*building*", used in the Zoning Order but not defined in the Order itself, is defined by section 1 of the Act. The term "*building operation**s***" (emphasis added) is defined in a non-exhaustive way in section 1 of the Act, as is "*dwelling*". But none of the actual defined terms, including (crucially) "*trade or business premises*" is defined in the Act. Neither counsel referred the Court to any definitions in the Draft 2008 Plan which could fairly be said to modify those contained in the Zoning Order. However in paragraphs 22-23 of Mr. Woloniecki and Mr. Turner's Skeleton Argument, they point out that following definition of the somewhat similar concept of "*commercial development*" in the Draft 2008 Plan is similar in character to the "*trade or business premises*" concept in the Zoning Order:

> " *'commercial development' means development for the provision of goods and services including, but not limited to shops; restaurants, cafes and bars; offices; services such as beauty parlours, laundromats, locksmiths and shoe repair shops; artists' studios and local craft shops; and showrooms and rental outlets; and "commercial premises" and "commercial use" shall be construed accordingly…*"

23. Nor is the position, more significantly still, any different when the 1965 Act (which initially repealed the 1948 rules and preserved the Zoning Order in effect) is considered. The 1965 Act has the same definitions for "*building*" and "*building operations*" as does the 1974 Act; "*dwelling*" is not defined, however. But none of the terms defined in the Zoning Order (nor, apparently, in the over 30 other broadly similar zoning Orders) were defined in the 1965 Act. Although the position under the previous development plans has not been considered, it seems improbable that any general plans (any more than any general legislation) would contain definitions intended to supersede those contained in special local subsidiary legislation.

24. Accordingly, I find that the definition of "*trade and business premises*" in the Zoning Order, which incorporates by reference the definition originally formulated in the now-

[3] Many of the other Orders contain five defined terms, adding "*purpose involving human habitation*".

repealed 1948 Building Rules, remains in force and has not been modified or repealed by subsequent primary or subsidiary legislation, nor by any development plans.

The meaning to be assigned to "trade and business premises" for the purposes of the Zoning Order

25. It is necessary to refer again to the crucial paragraph in the Zoning Order which provides as follows:

> "*7. No dwelling house or other building constructed on any lot of land shall be altered within the meaning of paragraph 2 (d) of rule 4 of the Building Rules so that it may be used as trade or business premises.*"

26. Mr. Cottle rightly submitted that the effect of this provision was a mandatory statutory prohibition on trade and business premises being erected in the area covered by the Zoning Order which overrode any general discretion the Board and/or the Minister had under the 2008 Draft Plan. The point of law at issue was whether or not the Cellular Tower fell within the rule 3(t) definition of "*trade or business premises*" or not. It is necessary again to refer to the key definition:

> "*the expression 'trade or business premises' means any building used as a shop, store, office, hotel, restaurant, café, bar, factory, workshop or other place* ***within which persons are commonly employed or engaged*** *in any trade, business or profession.*" [emphasis added]

27. The Appellants' counsel made the following submission, with reference to the similar concept of "*commercial development*" as defined by the 2008 Draft Plan, in their Skeleton Argument:

> "*23. 'Business', 'trade' and 'commercial' uses usually typically involve a building or some type of physical structure which house goods or services being offered, in addition to business equipment, employees, parking areas for employee's customers and loading areas. The use of land associated with a business, trade or commercial use [is] therefore highly intensive and active, with employees, customers and service providers coming and going from the premises…*
>
> *24. Words, whether contained in a contract or statute, must be given their natural and ordinary meaning. An act or other legislative instrument is*

however to be read as a whole, so that an enactment within it is not treated as standing alone but is interpreted in its context as part of the instrument…

28.The Appellants submit that the Zoning Order is clear in its language. The Zoning Order cannot be construed to include a Cellular Tower which does not fall within either of the categories listed in the Building Rules or the 2008 Draft Plan…."

28. Mr. Woloniecki in his oral argument heavily relied on the fact that the 2008 Draft Plan did not treat cellular towers as a form of commercial development, but addressed them as an entirely separate category of development in extremely flexible terms:

"*Telecommunication Towers*
The development of the telecommunications sector is important for the Island's economy but it must be regulated to safeguard the health of residents and the environment. The environmental impact of telecommunication facilities is related to the location of the structure, the scale of the structure and the number of structures. Planning regulations will ensure that telecommunication structures are located in suitable locations, have minimal visual impact, and are kept to a minimum in number through the encouragement of the shared use of existing support structures (collocating). In the evaluation of any planning application for telecommunication facilities or equipment, support structures or the replacement of any support structure, the Board shall take into consideration the proposal's location, scale, design, appearance, feasibility for collocation, and impact on the neighbouring area...

UTL.17 The replacement of an existing support structure, a new support structure or new telecommunications equipment may be permitted in any Base Zone, Conservation Area or Protection Area at the discretion of the Board but only if the Board is satisfied that:-

(a) the location, scale, design and appearance of the development have a minimal impact on the surrounding area;
(b) the proposal does not have a detrimental impact on the health and safety of the surrounding area;
(c) the proposal does not have an adverse impact on aerial navigation and is supported by the Departments of Civil Aviation and Airport Operations;
(d) the development will not result in an over-intensification in the number of telecommunication towers in the immediate area;
(e) the applicant can demonstrate that every effort has been made to utilize or share an existing support structure; and
(f) the grounds in support of the application as submitted by the applicant

justify the exercise of the Board's discretion."

29. In essence, it was contended that (a) the Zoning Order on a straightforward reading did not contemplate forms of development such as the Cellular Tower as constituting trade or business premises, and (b) this meaning was entirely consistent with the modern national planning policy position under the 2008 Draft Plan.

30. Mr. Cottle was forced to rely in response on a broad-brush and common sense approach which invited the Court to adopt a non-technical interpretation of the Zoning Order. It was sufficient, he contended, to show that the Cellular Tower was being used for trade or business purposes (as it obviously was). In fairness, however, this was only a fall-back position; counsel's primary submission was based on the hypothesis (which I have ultimately rejected) that the narrow rule 3(t) definition did not apply. This primary position was succinctly summarised in the Respondent's Skeleton Argument as follows:

> "*63. As to the phrase 'used as trade or business premises'; it is respectfully submitted that no question of construction arises as to the meaning of the phrase, 'used as trade or business premises as appears in the relevant zoning order; that meaning is plain and obvious; and that Digicel uses the facility as trade and business premises as part of its business operations.*"

31. This was a potentially valid analysis if the rule 3(t) definition of trade and business premises, which clearly contemplates premises upon which employees are likely to be based for the purposes of carrying on trade activities, did not apply. However, with the Appellants conceding that the Cellular Tower was an alteration which required planning permission and succeeding in establishing that the narrow Building rules definition of "*trade and business premises*" does apply, the Respondent's analysis loses almost all its force. It may be plain and obvious that Digicel's Cellular Tower is in general terms being used for trade or business purposes, but it is difficult to see how that fact can override the proper legal meaning to be given to the statutorily defined term in paragraph 7 of the Zoning Order.

32. That definition clearly envisages what might be called traditional trade and business premises where goods and services are sold (or perhaps goods merely stored) and people come and go for business purposes. The words used do not simply convey this sense according to their ordinary meaning. This interpretation is entirely consistent with the manifest object and purpose of the Zoning Order read as a whole; the instrument is designed to create a residential zone within which the only human activities are residential. While the term "building" as defined by the 1974 Act includes structures, the term "premises" is not statutorily defined. It has been judicially noted that[4]:

[4] Pitchford J, in *London Borough of Hounslow-v- Thames Water Authority* [2003] EWHC 1197. Scott Baker LJ appears to have concurred on this point.

"*33. In Maunsell v. Olins [1975] 1 All E.R. 16 at page 19 Viscount Dilhorne had observed:*

> *" 'Premises' is an ordinary word of the English language which takes colour and content from the context in which it is used…it has, in my opinion, no recognised and established primary meaning. Frequently it is used in relation to structures of one kind or another."*

Lord Wilberforce agreed, at page 21, that the word 'premises' should be construed in its context."

33. Accordingly, I find that the words "*any building used as a shop, store, office, hotel, restaurant, café, bar, factory, workshop or other place **within which** persons are commonly employed or engaged in any trade, business or profession*" (emphasis added) according to their natural and ordinary meaning and legislative context do not apply to structures such as the Cellular Tower. Telecommunication towers are not structures "*within which persons are commonly employed or engaged in any trade, business or profession*".

Summary

34. It follows that Grounds 1 and 2 of the appeal succeed. The Minister erred in law in finding that the erection of the Cellular Tower contravened paragraph 7 of the Zoning Order and its strict prohibition on alterations involving the erection of trade and business premises.

Did the Minister err in law in finding that the development contravened the relevant provisions of the 2008 Draft Plan?

35. No need to consider the remaining grounds of appeal strictly arises. However, it is necessary to record why I find that (a) the Appellants' submission that this Court ought to grant the planning application by way of appellate relief, and (b) the Respondent's submission that this Court should decline to disturb the Minister's decision notwithstanding any error in construing the terms and effect of the Zoning Order, must both be rejected.

The Minister's appellate jurisdiction

36. The Appellants essentially submitted under their remaining grounds of appeal that the facts as found by the Inspector only supported the grant of the permission sought. Since all other planning requirements were met so the adverse visual impact on one neighbour ought to have been found to be minimal. According to their Skeleton Argument:

"34.*Had he given proper regard and/or weight to these findings, the Minister ought to have concluded that the Cellular Tower:*

(i)had no greater visual impact than an electric/telephone pole,
(ii)was consistent with the spirit and policy guidelines of the 2008 Draft Plan, and

(iii)the benefits of the Cellular Tower far outweighed its visual impact, if any."

37. Mr. Cottle correctly countered that the Minister was not bound merely to apply the provisions of the Plan. As Lord Slynn has noted, analysing the appellate powers of the Minister (contrasted with the Board's original planning application jurisdiction) in *Barber-v- The Minister of the Environment & Others* [1997] UKPC 25 at paragraph 19:

> "*…In section 57(7) in the exercise of his functions on an appeal the Minister "shall have regard to" the relevant provisions of the development plan and to any material consideration. The words the Minister "shall have regard to" are to be contrasted with the words the Board "shall not grant" in section 17. On the face of it there is a clear distinction. Under section 57 there is no absolute embargo on the grant of planning permission. The Minister must have regard to the development plan. He cannot ignore it altogether. But once he has had regard to it he may still grant or refuse planning permission. Under section 17 the Board cannot grant permission if the development would be at variance with the development plan.*"

38. Section 17 of the Act defines the Board's jurisdiction in respect of a planning application as follows:

> "***Determination of applications***
> *17 (1) Subject to this Act, where application is made to the Board for planning permission, the Board may grant permission either unconditionally or subject to such conditions as they think fit or may refuse permission and, in the exercise of their discretion under this section the Board*
>
> > *(a) shall not grant planning permission which would result in development at variance with this Act, a development plan, the regulations, a zoning order, a municipal byelaw or other statutory provision, to the extent that the same may be relevant to the application;*
> >
> > *(b) shall have regard to any other relevant consideration.*"

39. Section 57, dealing with the Minister's powers on an appeal against a Board's decision under section 17, provides as follows:

"***Appeals to the Minister***

57 (1) The Director or any person aggrieved by a decision of the Board may by notice under this section appeal to the Minister.

(2) Any notice under this section shall be served within such time and in such manner as may be prescribed by the rules.

(3) The Minister, subject to this section, may allow or dismiss the appeal, or may reverse or vary any part of the decision of the Board, whether the appeal relates to that part or not, and may deal with the application as if it had been made to him in the first instance.

(4) Before determining an appeal under this section, the Minister shall, if the applicant so desires, afford him an opportunity of appearing before, and being heard by, a person appointed by the Minister for the purpose.

(5) Subject to section 61 the decision of the Minister on any appeal under this section shall be final.

(6) If before or during the determination of an appeal under this section in respect of an application for planning permission, the Minister forms the opinion that, having regard to this Act a development plan, zoning order or other provision of law, planning permission—

(a) could not have been granted by the Board; or

(b) could not have been granted by them otherwise than subject to the conditions imposed by them, he may decline to determine the appeal or to proceed with the determination.

(7) In the exercise of his functions under this section the Minister shall have regard to the provisions of the development plan for the area where the land in question is situated, in so far as those provisions are material to the development of that land, and to any material consideration."

40. Not only does the Minister have the power to deal with an appeal *de novo* (section 57(3)); unlike the Board, the Minister may refuse or grant permission for material reasons which are extraneous to the Plan. The circumstances where a departure from the Plan will be justified would appear to me to be exceptional, however. It is clear from the Court of Appeal for Bermuda's judgment in *Barber-v- Minister for the Environment* [1995] Bda LR 9 (at page 3) that the departure from the draft Plan in that case was justified by the fact that the Final Plan would be modified in a material respect.

41. So the starting assumption must be that the Minister will apply the Plan; this assumption may be rebutted where the Minister explicitly signifies by his decision that he is not

applying the Plan by reason of a particular material consideration pursuant to section 57 (7) of the Act. In the present case because the Minister's primary decision was that he was bound to apply the statutory requirements of the Zoning Order, it is impossible to be satisfied that he fully considered (a) whether the application should be refused for contravening the Plan, and/or (b) whether the application should in any event be refused or granted for some other material consideration.

The Court's appellate jurisdiction

42. Section 61 of the Act provides as follows:

> "***Appeals to the Supreme Court***
> *61 (1) The Director or any party to proceedings before the Board—*
>
> > *(a) which have been the subject of an appeal under section 57;*
> >
> > *(b) where the decision of the Board in the matter has been varied by direction of the Minister in accordance with the powers vested in him by section 30, 48 or 60,*
>
> *who is aggrieved by the decision or direction of the Minister in the matter* ***may appeal to the Supreme Court on a point of law*** *within twenty-one days or such longer period as the Supreme Court may allow after receipt of notification of such decision or direction.*
>
> *(2) On any appeal under this section the Supreme Court may make such order, including an order for costs, as it thinks fit.*
>
> *(3) Section 62 of the Supreme Court Act 1905 [title 8 item 1] shall be deemed to extend to the making of rules under that section to regulate the practice and procedure on an appeal under this section.*" [emphasis added]

43. The fact that appeals to this Court are limited to points of law signifies that policy judgments are matters within the Board's and the Minister's domain. This Court must be astute to avoid traversing the boundary laid down by the Legislature between the Judiciary's role of correcting errors of law and the Executive's role of making policy judgments. The Respondent's counsel relied on *Corporation of Hamilton-v-Minister of the Environment and Billings* [1998] Bda LR 17 in support of the submission that this Court ought simply to affirm the Minister's decision. The following *dictum* of Clough JA (at page 14) on behalf of the Court of Appeal for Bermuda is binding on this Court:

> "*Nevertheless, the contention of the Corporation below and on appeal is that the Minister failed to have regard to the material consideration that 93 per cent of the*

applicant's site was vacant with the result that the proposed development could be accommodated elsewhere. In the light of the Minister's treatment of the issue in paragraph 4 of his letter he clearly did have regard to the fact that the extension could be sited elsewhere. The gravamen of the Corporation's case can only be that the Minister did not give sufficient weight to this fact. The evaluation of the planning issue between the architects and the Corporation was for the Minister. In the absence of Wednesbury unreasonableness on the part of the Minister it is not for the Court to question that evaluation."

44. It is not properly open to this Court to reverse the Minister's decision on the grounds that he ought to have allowed the Appellants' appeal having regard to the fact that the application was broadly compliant with the 2008 Draft Plan. The Appellants have at best been able to show that they have good arguable case for the grant of planning permission if the Zoning Order's prohibition (which does not apply) is ignored. In my judgment it is not possible to conclude that, had the Minister not erred in law, any dismissal of the appeal would have been perverse. This is not because the case against the application seems convincing; rather, it is because it seems clear that neither the Board nor the Minister have yet to fully assess the merits of the application without regard to the assumption that there was a strict prohibition against the Cellular Tower under the terms of paragraph 7 of the Zoning Order.

45. Nor is it possible to accept the Respondent's submission that the Appellant's failure to show that the Minister's decision was perverse means that decision must be upheld. This conclusion is also inevitable because the decision as regards the Plan is infected by the flawed legal analysis which formed the primary basis for the decision.

Summary

46. For the above reasons, grounds 3, 4 and 6 fail but this provides no alternative basis for affirming the impugned decision.

Did the Minister err in law by taking into account the Inspector's reliance on the retroactive character of the application?

47. It is unclear whether the Minister placed any reliance on the final paragraph of the Inspector's Findings and the following observations:

> "*I am also reluctant to support an appellant that has shown such flagrant disregard for the planning process, not once but twice. To react to an enforcement notice by replacing the offending structure with a bigger one is both arrogant and provocative, and hardly likely to endear one to the authorities.*"

48. In light of the conclusions reached on the main grounds of appeal, no formal disposition of this issue arises. There may be cases where the fact that an applicant has proceeded to erect a structure without planning permission is in and of itself a ground for refusing an

application or a material consideration to be taken into account. This does not appear to be such a case as this matter did not form part of either (a) the Director's grounds for recommending refusal as set out in the Board Report; (b) the Board's reasons for refusing the application; or (c) the Minister's reasons for refusing the appeal to him. This dimension to the background to the application could not properly be taken into without prior notice to the Appellants affording them an opportunity to respond, having regard to the rules of natural justice. It is unfortunate that these remarks found their way into the Inspector's Report; if they were taken into account by the Minister, this would provide another ground for setting aside the Minister's decision.

Relief

49. This Court's powers when entertaining an appeal are defined by section 61 of the Act as follows:

> "*(2) On any appeal under this section the Supreme Court may make such order, including an order for costs, as it thinks fit.*"

50. For the reasons set out above, the only appropriate order to make is to (a) set aside the Minister's decision, and (b) remit the matter for re-hearing according to law. It is potentially open to this Court to remit the matter back to the Board to adjudicate on the basis that the Zoning Order does not apply to the Cellular Tower, or to remit the matter to the Minister (effectively depriving the Appellants of any intermediate appeal).

51. As I did not avert to the two alternative remittal options open to me in the course of the hearing, I did not invite counsel to address me on this issue. I will therefore hear counsel (and the Appellants' counsel in particular) on the question of whether or not the matter should be remitted back to the Board or simply to the Minister.

52. I will also hear counsel as to costs. However there is no obvious reason why costs should not follow the event.

Conclusion

53. The Appellants' primary grounds of appeal succeed. The Minister (and the Board) erred in law in deciding that the 2nd Appellant's planning application fell afoul of the prohibition on the establishment of "*trade or business premises*" in paragraph 7 of the Knapton House Estate Zoning Order 1957. The narrow definition of the phrase "*trade or business premises*" imported into the Order from the now-repealed Building Rules 1948 (construed according the natural and ordinary meaning of the statutory words in their context) only applies to premises "*within which*" persons are ordinarily employed for commercial purposes. As a matter of law, the Cellular Tower which the present case concerns falls outside the scope of the prohibition which formed the main basis of the Minister's decision.

54. Because the appeal record indicates that application was never fully assessed on its merits under the Plan at all, this Court cannot properly either (a) quash the decision and order the Minister to grant the application (as the Appellants sought), nor (b) confirm the decision on the grounds that the application was fully considered under the 2008 Draft Plan and rightly refused (as the Respondent sought). The alternative basis of the impugned decision was clearly tainted by the primary finding that the application was in breach of the mandatory prohibition contained in the Zoning Order. The Appellants appear to me to have a good arguable case for the grant of the permission sought under the Plan. However the merits of the policy judgments involved in adjudicating the application on its factual merits fall within the proper statutory ambit of the Board and the Minister. Such matters fall outside the appellate jurisdiction of this Court, which is limited to determining whether the validity of the appealed decision can be impeached on the grounds of errors of law.

55. The Minister's decision refusing planning permission is accordingly quashed. I will hear counsel as to whether the matter should be remitted for reconsideration to the Board or the Minister, and as to costs.

Dated this 29th day of April, 2011 _____
KAWALEY J