[2024] JMSC Civ 64

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. SU 2021 CV 00181

BETWEEN	**CHARLEY'S WINDSOR HOUSE LIMITED**	**CLAIMANT**
AND	**PRIME MINISTER AND MINISTER OF ECONOMIC GROWTH & JOB CREATION**	**DEFENDANT**

IN OPEN COURT

Mesdames Trudy-Ann Dixon Frith and Allyson Mitchell instructed by Messrs. DunnCox for the Claimant

Mr Romario Miller and Ms Rushell Duncan instructed by the Director of State Proceedings for the Defendant

Heard: January 17 and 18, 2024 and May 31, 2024

Judicial Review – Claim for judicial review – Availability of remedy – Certiorari – Application for the grant of an order of certiorari to quash the decision of the minister with responsibility for town and country planning – Mandamus – Application for the grant of an order of mandamus to compel the minister with responsibility for town and country planning to grant the application for building and planning permission to construct a fuel station and convenience store – Whether the decision to refuse the application is unreasonable – Whether the defendant failed to comply with the statutory requirements – Whether the defendant treated with the application as though it had been made to him in the first instance – Whether the defendant mistook relevant facts in the decision-

making process – Whether the defendant failed to consider relevant factors which he ought to have considered in the exercise of his statutory discretion – Whether the defendant erred in law in arriving at his decision – Whether there is a statutory and or common law duty which is cast on the defendant to provide reason(s) for his decision – Town and Country Planning Act, sections 13(2) and 28A

A. NEMBHARD J

INTRODUCTION

[1] The Claimant, Charley's Windsor House Limited ("CWHL"), is desirous of constructing a gas station and convenience store on land which is located at 9 Herb McKenley Drive, Kingston 6, in the parish of St. Andrew, a proposal which would put this land to commercial and light industrial use. To this end, CWHL applied for planning and building permission from the relevant authorities, namely the Town and Country Planning Authority ("TCPA") and the Kingston and Saint Andrew Municipal Corporation ("KSAMC"). Both entities refused the applications. Consequently, CWHL sought to challenge these decisions by lodging an appeal with the Defendant. This appeal was dismissed by the Defendant and the resultant issues which arise from that decision constitute the subject of this judgment.

[2] By way of its Fixed Date Claim Form, which was filed on 6 May 2021, CWHL seeks the following Orders for Administrative and Declaratory relief: -

i. An Order of Certiorari against the Defendant quashing his decision and finding made on 25 October 2020, refusing the appeal of the Claimant which challenged the decision of the Town and Country Planning Authority [which was] made on 21 May 2019, relative to planning permission for property known as land comprised in Certificate of Title now registered at Volume 1365 Folio 368 of the Register Book of Titles and bearing civic address 9 Herb McKenley Drive, Kingston 6, Saint Andrew.

ii. An Order of Mandamus against the Defendant compelling him to allow the appeal of the Claimant, which challenged the decision of the Town and Country Planning Authority made on 21 May 2019, and to grant the planning permission sought by the Claimant for the construction and development of the petroleum storage and dispensing facility on the property known as the land comprised in Certificate of Title now registered at Volume 1365 Folio 368 of the Register Book of Titles and bearing civic address 9 Herb McKenley Drive, Kingston 6, Saint Andrew.

iii. A Declaration that the decision and finding of the Defendant [which was] made on 25 October 2020, refusing the appeal of the Claimant which challenged the decision of the Town and Country Planning Authority made on 21 May 2019, is unlawful and accordingly is null, void and of no effect.

iv. That there shall be no order as to costs.

[3] These Orders are sought on the following bases: -

1. That the decision and or finding which was made by the Defendant is unlawful, unreasonable, irrational, and illogical.

2. That the decision is unlawful, unreasonable, irrational, and illogical and is thereby null and void, due to but not limited to the following: -

    a. That the Defendant gave no reason(s) or gave no adequate reason(s) for the decision.

    b. That the Defendant considered incorrect facts, including that the said property is in a predominantly residential area, in arriving at the decision, thereby committing a grave mistake of fact and or law.

c. That the Defendant considered irrelevant considerations in the decision-making process.

d. That the Defendant gave no weight or gave insufficient weight to the material considerations, that the circumstances demanded in the decision-making process.

e. That the Defendant committed errors of law in arriving at the decision.

3. That there is no appeal procedure set out in the Town and Country Planning Act to challenge the decision of the Minister responsible for town and country planning, who is the Defendant.

4. That there are no alternative remedies available to the Claimant and that all alternative remedies have been exhausted by the Claimant.

5. That the Claimant is personally and directly affected by the decision of the Defendant.

THE ISSUES

[4] The following issue is determinative of the Claim: -

i. Whether the Defendant's decision to refuse the Claimant's appeal was unreasonable, irrational, illogical and unlawful.

[5] In seeking to resolve this issue, the following sub-issues must also be addressed: -

a. Whether the Defendant failed to comply with sections 13(2) and 28(A) of the Town and Country Planning Act.

b. Whether a failure to comply with either of these sections invalidate the decision which was made by the Defendant in respect of the application.

c. Whether the Defendant treated with the application as though it had been made to him in the first instance, as contemplated by section 13(2) of the Town and Country Planning Act.

d. Whether the Defendant mistook relevant facts in the decision-making process.

e. Whether the Defendant failed to consider relevant factors which he ought to have considered in the exercise of his statutory discretion.

f. Whether the Defendant took into consideration irrelevant factors in determining the Claimant's appeal.

g. Whether the Defendant's finding that the proposed petrol filling station and convenience store would be an undesirable intrusion into the identified area amounted to a mistake of fact and was, consequently, irrational, or unreasonable.

h. Whether the Defendant erred in law in arriving at his decision.

i. Whether there is a statutory and/or common law duty which is cast on the Defendant to provide reason(s) for his decision.

BACKGROUND

[6] CWHL is a registered company with offices located at Main Street, Brown's Town, in the parish of St. Ann. On 17 November 2003, CWHL became the registered proprietor of an estate in fee simple of the land located at 9 Herb McKenley Drive, Kingston 6, in the parish of St. Andrew, being the land comprised in Certificate of Title formerly registered at Volume 391 Folio 44, now registered at Volume 1365 Folio 368 of the Register Book of Titles ("the land").[1]

[7] In or around December 2018, CWHL applied to the Town and Country Planning Authority ("TCPA") and the Kingston and Saint Andrew Municipal Corporation ("KSAMC"), for planning and building permission to construct a petroleum storage and dispensing facility (a gas station) and a convenience store on the land. This proposed venture would put the land to both commercial and light industrial use. The application for planning and building permission was contained in a document entitled 'Project Brief' and was accompanied by an Emergency Preparedness and Response Plan, dated December 2018, a Waste Management Plan, dated December 2018 and a Closure Plan, dated December 2018.[2]

[8] Mr Christopher Charley, a Director of CWHL, avers that this application for planning permission was also supported by architectural drawings which were prepared by architects, DRA Building Solutions. These drawings reflected the proposed development project as it would be laid out on the ground. Mr Charley further avers that these drawings were lodged with the TCPA, KSAMC and the National Environment and Planning Agency ("NEPA"), on or about 1 May 2019. Revised architectural drawings were prepared to address and to rectify issues raised as to the sewage treatment system and which were approved by the

[1] See – Exhibit "**CWH1**", which contains a copy of the Duplicate Certificate of Title registered at Volume 1365 Folio 368 of the Register Book of Titles.

[2] See – Paragraphs 9 – 11 inclusive of the Affidavit of Christopher S. Charley in Support of Fixed Date Claim Form for Judicial Review, which was filed on 6 May 2021. See also, Exhibits "**CWH2**", "**CWH3**", "**CWH4**" and "**CWH5**", which contain copies of the Project Brief, Emergency Preparedness and Response Plan, Waste Management Plan and Closure Plan.

National Works Agency ("NWA"). These drawings were re-lodged with TCPA, KSAMC and NEPA, on or about 12 June 2019.

[9] At a meeting which was held on 21 May 2019, the TCPA refused permission for the construction of the petroleum storage and dispensing facility on the land and communicated its reasons for its refusal by way of a letter dated 11 June 2019.[3] KSAMC also refused to grant planning permission by way of its letter dated 9 July 2019.[4] Dissatisfied with the refusal to grant planning permission, CWHL sought to challenge the decision of the TCPA and lodged an appeal to the Minister responsible for town and country planning, who is the Defendant.[5]

[10] The Defendant appointed the Honourable Mr Daryl Vaz MP, the then Minister Without Portfolio in the Ministry of Economic Growth and Job Creation, to hear, receive and examine the evidence on the appeal ("the Honourable Minister").[6] On 26 November 2019, the appeal was heard, and evidence received by the Honourable Minister.

[11] By way of letter dated 25 October 2020, CWHL's appeal of TCPA's decision was dismissed ("the Decision").[7]

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[3] See – Exhibit "**CWH6**", which contains a copy of the letter dated 11 June 2019 addressed to CWHL and signed by Ms Morjorn Wallock, Secretary of the TCPA. See also, paragraph 14 of the Affidavit of Christopher S. Charley in Support of Fixed Date Claim Form for Judicial Review, which was filed on 6 May 2021 and Exhibits "**CWH7**" and "**CWH8**", which contain copies of an email dated 30 September 2019 sent by Ms Deborah Lee Shung, Manager of the Legal Services Branch of NEPA and the Revised Policy Guidelines for Proper Sitting and Design of Petrol and Oil Filling Stations, (NEPA's Policy Guidelines), dated 18 January 2019.

[4] See – Exhibit "**CWH9**", which contains a copy of the letter dated 9 July 2019 addressed to CWHL and signed by Mrs Paula Rose-Rochester.

[5] See – Exhibit "**CWH10**", which contains a copy of the letter sent on behalf of CWHL and dated 17 July 2019 addressed to the Honourable Minister without Portfolio in the Ministry of Economic Growth and Job Creation.

[6] See – Exhibit "**CWH11**", which contains a copy of the letter dated 31 July 2019 from the Ministry of Economic Growth and Job Creation addressed to CWHL's legal representatives.

[7] See – Exhibit "**CWH12**", which contains a copy of the letter dated 25 October 2020 from the Ministry of Economic Growth and Job Creation addressed to CWHL's legal representatives, communicating the dismissal of CWHL's appeal.

The position advanced by CWHL

[12] CWHL asserts that the appeal ought to have been heard by the Defendant himself, as mandated by the Town and Country Planning Act. It is also asserted that the Defendant upheld the decision of the TCPA and committed errors of law or errors of fact and of law, to include the following: -

a) That the planning proposal for the gas station fell within Class 7 – General Industry of the 2017 Development Order.

b) That Policy PFS3 and Policy PFS4 of the 2017 Development Order prohibit such industries taking place where the amenities may be adversely affected.

c) That light industrial use of the land is incompatible with areas zoned for commercial use.

d) That the proposed use of the land is incompatible with the present uses of other properties in the area.

e) That the Defendant failed to determine whether and to what extent the application for planning permission complied with the 2017 Development Order.

f) That the Defendant was bound by the terms of the 2017 Development Order, NEPA's Policy Guidelines and NEPA's Revised Report. This, CWHL contends, means that the Defendant fettered his discretion.[8]

[13] CWHL contends that, if the appointment of the Honourable Minister took place from 31 July 2019, the evidence was taken, and the appeal heard more than

[8] See – Paragraphs 48-63 of the Affidavit of Christopher S. Charley in Support of Fixed Date Claim Form for Judicial Review, which was filed on 6 May 2021. See also, Exhibits "**CWH19**" and "**CWH20**", which contain the Claimant's Speaking Notes dated 20 November 2019 and an Addendum contained in the letter dated 28 November 2019, respectively.

twenty-one (21) days after that appointment, which constitutes a breach of the statutory requirements.

[14] It is further contended that the Decision was made far more than ninety (90) days after the hearing of the appeal, contrary to section 13(2) of the Town and Country Planning Act. The Decision was made almost a year to date after the hearing of the appeal. CWHL further contends that the Defendant did not indicate whether he received any written report(s) of the findings and recommendations made by the Honourable Minister, in accordance with section 28A(1)(b) of the Town and Country Planning Act.

[15] CWHL asserts that the Defendant has not provided any reasons for the conclusion that "this type of land use cannot be supported at the proposed location." CWHL asserts that the reason stated in the Decision is grossly inadequate in that the Decision disclosed no findings of fact and or of law; and the way in which any issues of fact or of law were resolved, including that of whether the land is in an area which is predominantly residential. CWHL also asserts that the Defendant did not name the "technical reports" on which he relied.

[16] CWHL maintains that the Defendant made a mistake of fact in his finding that the land is in a predominantly residential area, as the land is in a predominantly commercial area with instances of light industrial use.[9] At the time of the appeal and up to the time of this hearing, businesses were being operated on many of the adjoining properties. CWHL contends that Herb McKenley Drive formed a part of a formerly residential area called Little Retreat, an area which is now predominantly used for commercial purposes, and which houses several professional offices, stores, and light industrial users, including a factory, a storage warehousing facility and a petrol filling station, namely, Total Jamaica Limited.

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[9] See – Exhibit "**CWH13**", which contains a copy of the Expert Report of Breakenridge & Associates, Chartered Valuation Surveyors, dated 15 September 2018. See also, paragraph 30 – 32 inclusive of the Affidavit of Christopher S. Charley in support of Fixed Date Claim Form for Judicial Review, which was filed on 6 May 2021.

[17] Since in or around 2017, in recognition of the very significant shift in the development and usage of land in the area where the land is located, there was issued a Provisional Development Order 2017 for Kingston and St. Andrew and Pedro Cays, which indicates that sections of Little Retreat to include the land, have been re-zoned for commercial or office use.[10]

[18] This developmental shift in the area was confirmed by a Revised Report prepared by NEPA, entitled "*Town and Country Planning Authority/National Environment & Planning Agency Submission to the Minister of Economic Growth and Job Creation re Refusal to Grant Planning Permission under section 12 of the Town and Country Planning Act, 1957 for a proposed Petroleum Storage and Dispensing Facility (Gas Station) at 9 Herb McKenley Drive, St. Andrew by Charley's Windsor House*" ("NEPA's Revised Report").[11] CWHL asserts that it's application for planning permission was not opposed by the NWA,[12] the Ministry of Health or the Jamaica Fire Brigade.

[19] Additionally, CWHL maintains that the Defendant did not consider or had insufficient regard to the following considerations, which were highlighted during the appeal and which, CWHL maintains, were material considerations: -

a) That the area where the land was located was rezoned for commercial use.

b) That the properties immediately surrounding the land are all being used for commercial and light industrial purposes.

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[10] See – Exhibit "**CWH14**", which contains a copy of the Northern Mountain View Local Planning Land Use Proposals (Inset No. 10) of the Town and Country Planning (Kingston and Saint Andrew) Provisional Development Order 2017.

[11] See – Exhibit "**CWH15**", which contains a copy of NEPA's Revised Report, prepared in relation to the planning permission application, dated May 2020. See also, paragraphs 34 – 42 inclusive of the Affidavit of Christopher S. Charley in support of Fixed Date Claim Form for Judicial Review, which was filed on 6 May 2021.

[12] See – Exhibits "**CWH17**" and "**CWH18**", which contains a copy of a letter dated 4 February 2020, communicating NWA's approval of the application for planning permission, subject to certain conditions and a copy of a letter dated 18 August 2020, communicating CWHL's willingness to adhere to the conditions as imposed by the NWA.

c) That there is no residence adjoining the land which will be adversely affected by the proposed facility.

d) That NWA approved the application for planning permission, with certain conditions attached, and that CWHL was willing to adhere to those conditions, in the construction of the gas station and convenience store.

e) That the application for planning permission contained vapour recovery systems, which permitted a reduction of the setback requirements and that CWHL was willing to agree to the additional requirements of being subject to the approval of the Ministry of Health and the Bureau of Standards of Jamaica in this regard.

f) That by way of its Fixed Date Claim Form bearing Claim No. 2018 HCV 04903, filed in this Honourable Court on December 12, 2018, CWHL has sought a modification and/or discharge of restrictive covenants which are endorsed on the Certificate of Title for the land.

g) That the owners of the adjoining and contiguous properties (including the church and the nursery on the opposite side) did not object to the application for planning permission (having been served with the relevant court documents for the modification of the restrictive covenants).

h) That the Ministry of Health has not lodged any objections to the application for planning permission.

i) That the Jamaica Fire Brigade has also approved the building proposal (both the Ministry of Health and Bureau of Standards of Jamaica were served with the application for planning approval and

the court documents have also been served on the Ministry of Health).

j) That CWHL has generally complied with all applicable Guidelines for the construction of a gas station, including those set out in the 2017 Development Order and the NEPA Policy Guidelines.

The position advanced by the Defendant

[20] For his part, the Defendant avers that the Honourable Minister heard the appeal against the decision of the TCPA as well as the appeal, after which a Minister's Brief was prepared to provide him [the Defendant] with a written report of the findings and recommendations for his [the Defendant's] determination.[13]

[21] Any failure of the Defendant to hear the appeal himself and after the expiration of the twenty-one (21) day period from the appointment of the Honourable Minister does not render the appeal proceedings and/or any decision resulting therefrom invalid or null and void. The Defendant further contends that any failure to render a decision on the appeal within ninety (90) days of the hearing does not mean that his decision can be properly impugned as being without legal effect.

[22] The Defendant further maintains that there was no legal duty cast on him to provide reasons for his refusal of the appeal. Further, the Defendant contends that the refusal of the appeal meant that the decision of the TCPA was upheld.

THE LAW

The role of the court in judicial review proceedings

[23] Part 56 of the Civil Procedure Rules, 2002, as amended ("the CPR"), is entitled Administrative Law and deals with matters such as this. The role of the court in

[13] See – Exhibit "**SP1**", which contains a copy of the Minister's Brief and Appendices bearing hearing date 26 November 2019.

judicial review is to provide supervisory jurisdiction over persons or bodies that perform public law functions or that make decisions that affect the public.

[24] The approach of the court is by way of review and not of an appeal. The grounds for judicial review have been broadly based upon illegality, irrationality or impropriety of the procedure and the decision of the inferior tribunal. These grounds were explained in the case of **Council of Civil Service Unions v Minister for the Civil Service**.[14]

[25] Roskill LJ stated as follows: -

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

[26] Judicial review is the courts' way of ensuring that the functions of public authorities are executed in accordance with the law and that they are held accountable for any abuse of power, unlawful or ultra vires act. It is the process by which the private citizen (individual or corporate) can approach the courts seeking redress and protection against the unlawful acts of public authorities or of public officers and acts carried out that exceed their jurisdiction. Public bodies must exercise their duties fairly.

[27] Since the range of authorities and the circumstances of the use of their power are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. It is important to remember that, in every case, the purpose of the

[14] [1984] 3 All ER 935

remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law.

[28] The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority, after according fair treatment, reaches, on a matter which it is authorized or enjoined by law to decide for itself, a conclusion which is correct in the eyes of the court.[15]

[29] Judicial review is concerned, not with the decision but with the decision-making process. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power.

[30] Volume 61A (2023) of the Halsbury's Laws of England states: -

> *"The duty of the court is to confine itself to the question of legality. Its concern is with whether a decision-making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal could have reached or abused its powers. The grounds upon which administrative action is subject to control by judicial review have been conveniently classified as threefold. The first ground is 'illegality': the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second is 'irrationality', namely Wednesbury unreasonableness. The third is 'procedural impropriety'. What procedure will satisfy the public law requirement of procedural propriety depends upon the subject matter of the decision, the executive functions of the decision-maker (if the decision is not that of an administrative tribunal) and the particular circumstances in which the decision came to be made.*

[15] See – **Chief Constable of the North Wales Police v Evans** [1982] 3 All ER 141, at pages 143 g-h and 144 a

…

On an application for judicial review the court has power to grant a quashing order (formerly known as an order of certiorari), a prohibiting order (formerly known as an order of prohibition) or a mandatory order (formerly known as an order of mandamus).”

Certiorari

[31] Certiorari will not lie unless something has been done that a court can quash.[16] It is an order which quashes decisions of an inferior court or tribunal, public authority or other body and is one which is susceptible to judicial review. Such an order may be made where the decision-maker has acted in breach of one of the principles of public law; for example, where there has been a breach of the rules of natural justice or procedural fairness, or where there has been a breach of a legitimate expectation in the absence of overriding public need, or where the decision-maker has made an error of law.[17]

The effect of an order of Certiorari

[32] In the 8th edition of the text, Garner’s Administrative Law, the effect of the remedy of certiorari is described. At page 307, it is stated: -

[16] See – paragraph 16-017 of the 5th edition of De Smith, Woolf and Jowell’s **Judicial Review of Administrative Action**. See also, paragraphs 2-028 and 7-022 respectively; “*In summary, it can be said where an application is for an order of certiorari, logic may require that there be some “decision” or “determination” capable of being quashed. Certiorari (and prohibition) would issue to “anybody of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially*.”

[17] See paragraph 104 of Volume 61A (2023) of the Halsbury’s Laws of England

"The effect of the grant of an order of certiorari is to quash the decision or order in question, thus rendering it null and void. The consequences of such action may potentially be quite serious." [18]

[33] Paragraph 109 of Volume 61A (2023) of the Halsbury's Laws of England states: -

"The effect of a quashing order is that the unlawful decision or order is set aside and deprived of all legal effect since its inception. If the decision is quashed, the court may remit the matter to the decision-maker for them to reconsider the matter. The decision-maker may, as long as the error of law is not repeated and no other error committed, reach the same decision."

[34] In **Danville Walker v The Contractor-General**,[19] Campbell J (as he then was) espoused: -

"[30] Certiorari is one of three prerogative writs which form the trilogy of certiorari, prohibition, and mandamus. It is of significant importance in administrative law. Its foundation lies in the governance of the sovereign's realm. It is an instrument to ensure the efficient administration of government. It was meant to bring up the records of inferior courts for an examination for any errors on their face. The sovereign, wishing to be certified of some matters, would order that the necessary information be provided for him. Certiorari would move to quash decisions and orders on the grounds of illegality, procedural impropriety, and irrationality. The supervising court could not impose its own version of the impugned order. The remedy being discretionary, the court would refuse the remedies at its disposal on the basis of delay, or that the applicant did not make full and frank disclosure, or that there was an adequate alternative remedy available or that to make the remedy would be pointless."

[18] At footnote number 5 on the same page, it is noted: *"Note that the Court quashes a decision but does not substitute its own decision in its place (as an appellate body normally does). See, however, the power in Ord 53, r 9(4) to direct that the inferior Court, tribunal, or authority shall reconsider the matter and reach a decision in accordance with the Court's findings."*

[19] [2013] JMFC Full 1

Mandamus

[35] An Order for Mandamus commands the person or body to whom it is directed to perform a public duty imposed by law. A successful applicant for Mandamus must be able to show that he has asked that the duty be performed and has been refused. The court may not order mandamus against an authority which is doing its best to perform its duties.[20]

[36] Sir William Wade, at page 649 of the 6th edition of his text, Administrative Law, is quoted as follows: -

> *"The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities of all kinds. Like the other prerogative remedies, it is normally granted on the application of a private litigant, though it may equally well be used by one public authority against another. The commonest employment of mandamus is as a weapon in the hands of the ordinary citizen when a public authority fails to do its duty by him. Certiorari and prohibition deal with wrongful action, mandamus deals with wrongful inaction... the essence of mandamus is that it is a… command… ordering the performance of a public legal duty. It is a discretionary remedy, and the court has full discretion to withhold it in unsuitable cases."*

THE SUBMISSIONS

The submissions advanced on behalf of the Claimant

[37] Learned Counsel Mrs Trudy-Ann Dixon Frith, in her comprehensive written submissions, asserted that the decision of the Defendant, which is contained in letter dated 25 October 2020, was unreasonable in that he considered erroneous facts and neglected to consider relevant factors in the exercise of his statutory discretion. Mrs Dixon Frith asserted that the decision of the Defendant to refuse

[20] Page 308 of the Garner's Administrative Law, 8th edition. See also, **R v Bristol Corporation ex p Hendy** [1974] 1 WLR 498 at 503, CA; **R v Secretary of State for the Environment, ex p Smith** [1988] COD 3. Mandamus will not lie against the Crown, but it will lie against a Minister acting as such, see e.g. **Padfield v Minister of Agriculture, Fisheries and Food** [1986] AC 997.

the appeal of CWHL is unreasonable, irrational, and illogical, and falls within the classic grounds for judicial review.

Mistake of Fact

[38] It was submitted that the Defendant erred in his finding that the land is in an area which is predominantly residential. To buttress this submission, Mrs Dixon Frith relied on the Expert Report of Breakenridge & Associates, dated 18 September 2018.[21] It was submitted that the evidence clearly demonstrated that: -

i. all the properties which abut the land were being used for commercial purposes, including commercial offices and that there was no residence which joined common boundaries with the land.

ii. one hundred percent (100%) of the properties on Herb McKenley Drive, where the land is located, were being used for commercial and light industrial purposes, including a factory, gas station, car mart, warehousing facility, and professional offices (doctors', and lawyers' offices).

iii. there has been a consistent and significant shift from residential use of properties in the area (which were a part of a residential area called Little Retreat), to commercial use, resulting in the area being now rezoned to commercial/office use as reflected in the Town and Country Planning (Kingston and Saint Andrew) Provisional Development Order, 2017, including the Northern Mountain View Local Planning Land Use Proposals (Inset No. 10) of the 2017 Development Order.

iv. properties at the back of the land, which are located on Latham Avenue (one road leading off Herb McKenley Drive), are being used for commercial purposes and that all the properties on Latham

[21] A copy of this document was adduced before the Minister during the appeal – see Exhibit "**CWH13**".

> Avenue are being used for commercial purposes. In addition, Latham Avenue has a hotel, a security firm, a rehabilitation centre, a technology company, a photo and video studio and a computer software company. At the top of Latham Avenue (which leads to Old Hope Road), is a large multistorey commercial complex and at the corner of Latham Avenue and Herb McKenley Drive, there is a hotel (namely, Roosevelt Great House).

[39] Mrs Dixon Frith further submitted that there was a live issue of whether CWHL's proposed gas station and convenience store would create traffic congestion on Herb McKenley Drive. It was submitted that at the appeal stage, this was raised by the TCPA, in support of its first two reasons for its refusal of the application for permission. It was asserted that the TCPA gave no empirical, scientific, or expert analysis in arriving at this unsubstantiated allegation.

[40] Mrs Dixon Frith maintained that the authorities well establish that a mistake of a relevant fact is a ground for judicial review and that the Defendant, having misapprehended the nature of the area where the land is located, and having erred in his conclusion that the gas station would result in additional traffic, his decision is rendered liable to be quashed. In this regard, the Court was referred to the authority of **R (Alconbury Developments Ltd. & Others) v Secretary of State for the Environment, Transport & the Regions**.[22]

Relevant/Irrelevant Considerations

[41] Additionally, it was further asserted that, on an examination of the Defendant's decision, it is dearth and does not condescend to the particulars of the factors which were considered in the decision-making process.

[42] Mrs Dixon Frith maintained that the fact that the land is in an area which is predominantly commercial, with there being some light industrial use, there was no adequate justification for the Defendant's finding that the proposed use of the land could not be supported at the proposed location. It was further submitted

[22] [2003] 2 AC 295

that there is no logical connection between the evidence adduced at the hearing and the ostensible reasons for the Defendant's decision.

[43] It was further submitted that there are irrelevant factors which the Defendant considered, in the exercise of his statutory discretion. This, Mrs Dixon Frith maintained, together with the Defendant's failure to consider relevant factors, renders his decision illegal.

Errors of Law

[44] The complaint was made that the Defendant has failed to demonstrate that he considered the appeal of CWHL de novo, as is required by section 13(2) of the Town and Country Planning Act. Nor did the Defendant demonstrate that he had any regard to the 2017 Development Order and whether CWHL's application for planning permission adhered to same. Mrs Dixon Frith maintained that the 2017 Development Order rezoned the area where the land is located for commercial use and that specifically, the area now falls within the Northern Mountain View Local Area Plan, to which Policy NMV U34 of the 2017 Development Order is applicable. It was submitted that the said Policy permits light industrial activities in areas zoned for commercial use and that the proposal of CWHL falls squarely within land usage permitted by the 2017 Development Order. Mrs Dixon Frith maintained that, nowhere in the Defendant's decision has he acknowledged that, nor has he demonstrated that he considered it.

[45] By failing to consider the 2017 Development Plan, the Defendant thwarted the object and purpose of the Town and Country Planning Act. To buttress these submissions, the Court was referred to the authority of **Padfield & Others v Minister of Agriculture Fisheries & Food & Others**.[23]

Duty to provide Reasons

[46] It was acknowledged that there is no common law duty to provide reasons in planning permission cases such as this. The law has, however, long recognized that where there is a decision to grant or refuse planning permission, the

[23] [1968] 1 All ER 694

informed reader as well as the court should not be left with any real and substantial doubt, as to the reasons for the decision and the material considerations which were considered in arriving at that decision.

[47] In the present instance, there were several questions of law and of fact in controversy between the parties. Questions which were ventilated at the hearing of the appeal, including the critical issue of whether the area where the land is located was predominantly a residential area. In those circumstances, it was incumbent on the Defendant to provide the reasons for his decision. Nor did he indicate that he received recommendations from the Honourable Minister, in accordance with section 28A(1)(b) of the Town and Country Planning Act, what those recommendations were and whether he considered them.

Non-adherence with Statutory Requirements

[48] Finally, Mrs Dixon Frith submitted that there were certain statutory breaches which took place concerning the hearing of the appeal, including that: -

a) The appeal was heard, and evidence taken by the Honourable Minister outside of the prescribed limit of twenty-one (21) days after being appointed by the Defendant (section 28A of the Town and Country Planning Act).

b) The statute mandates that the appeal is to be heard by the Defendant himself. Consequently, Mrs Dixon Frith submitted, the Honourable Minister did not have the jurisdiction to hear the appeal, nor did he have the jurisdiction to take evidence at the appellate hearing. This ought to have been done by the Defendant. Accordingly, the panel at the appeal was not properly constituted and was in contravention of the specific requirements of the Town and Country Planning Act. The failure to adhere to the statutory requirements regarding the appeal (and any recommendations which may have been passed from the Honourable Minister to the Defendant) rendered the appellate process and the Defendant's

decision invalid. The Court was referred to the Full Court decision of **R v Licensing Authority & Anor, Ex parte Enterprises Ltd**.[24]

c) That the decision on the appeal was made far more than the ninety (90) day period prescribed by section 13(2) of the Town and Country Planning Act. The decision was made almost a year to date later. In that event, it was submitted, the decision is invalid.[25]

The submissions advanced on behalf of the Defendant

Whether the failure to comply with sections 13(2) and 28A of the Town and Country Planning Act invalidates the decision of the Minister.

[49] For his part, Learned Counsel Mr Romario Miller, in his succinct but equally comprehensive written submissions, submitted that there is no invalidating consequence stated in section 28A(2) of the Town and Country Planning Act. Mr Miller submitted that there is a window which allows for the Honourable Minister to hear the appeal. To substantiate this submission, Mr Miller referred the Court to section 9.5 of the text **Bennion, Bailey and Norbury on Statutory Interpretation.** The Court was also referred to the authorities of **R v Soneji**[26] and **Attorney General v Lopinot Limestone Limited**.[27]

[50] It was further submitted that the failure to comply with section 28A(2) of the Town and Country Planning Act does not invalidate the hearing of the appeal. Mr Miller maintained that section 13(2) of the Town and Country Planning Act is similar to section 28A of the same statute and is directory in nature. The failure to comply with the strict requirements of the statute, Mr Miller submitted, does not invalidate the thing which is being done.

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[24] (1982) 19 JLR 206

[25] See – **R vs Soneji & Anor** [2006] 1 AC 340

[26] [2003] All ER D 275

[27] (1983) 34 WIR

Whether the finding that the proposed petrol filling station and convenience store would be an undesirable intrusion in the predominantly residential area was irrational or unreasonable.

[51] It was submitted that the area in question was primarily residential but has undergone changes in its character. It was further submitted that there is still a residential component which must be considered, in light of the effect on the amenities which a petrol filling station may have. Mr Miller asserted that the proposed site is adjacent to Latham Avenue, which is residential. Regarding the threshold test for irrationality, Mr Miller referenced the definition of 'irrationality' as contained in the dicta of Lord Scarman in the authority of **Council of Civil Service Unions and Ors v Minister for the Civil Service**.[28] In this context, Mr Miller submitted, the Defendant's decision is not such that it could be considered irrational.

Whether the Defendant considered irrelevant considerations in the decision-making process.

Whether the Defendant gave weight to material considerations in the decision-making process.

[52] It was submitted that the Defendant, in his decision dated 25 October 2020, indicated that he has carefully considered the technical reports and submissions made and is satisfied that this type of land use cannot be supported at the proposed location. Mr Miller further submitted that the Defendant exercised his powers pursuant to section 13(2) of the Town and Country Planning Act, lawfully, reasonably, and rationally and did not consider irrelevant considerations in making his decision but gave weight to material considerations.

[53] Mr Miller asserted that there is no statutory duty imposed on the Defendant by the Town and Country Planning Act to provide reasons for his decision. In any event, it was submitted, the Claimant was at all material times aware of the issues that the Town and Country Planning Authority had with the application. It

[28] [1985] A.C. 374 at page 410

was submitted that the Defendant upheld the decision of the Authority, and accordingly, the same issues would have arisen.

Whether the Defendant was obliged to provide reasons.

[54] In this regard, Mr Miller relied on the authority of **Linton C. Allen v His Excellency the Right Hon. Sir Patrick Allen and Anor**[29] and submitted that Straw J, as she then was, examined the duty to provide reasons in circumstances in which the applicant, a member of the Jamaica Constabulary Force, sought judicial review of a decision of the Governor General, the 1st Defendant, to refuse the referral and deny the appeal of the penalty imposed in reducing his rank from Inspector to Sergeant.

[55] It was submitted that at paragraph [140] of the judgment, the court acknowledged that there was no statutory duty for the Commission or Governor General to give reasons for the decisions made but also generally concluded that ultimately it would be a balance of factors depending on the circumstances of the case which would determine whether the case called for giving reasons. Mr Miller submitted that the balance of factors weighs more heavily towards not calling for reasons as CWHL was at all material times aware of the issues which led to the refusal of planning permission.

[56] Finally, Mr Miller further submitted that the application for judicial review ought to be refused with costs to the Defendant because CWHL has not successfully proven the grounds set out in the Fixed Date Claim Form.

[29] [2017] JMSC Civ 24

ANALYSIS AND FINDINGS

[57] An analysis of the susceptibility of the decision of the Defendant, which was made on 25 October 2020, to judicial review must include a consideration of the following: -

a. Whether CWHL is directly affected by the decision of the Defendant.

b. Whether there is an appeal procedure established by the Town and Country Planning Act to challenge the decision of the Minister responsible for town and country planning, who is the Defendant.

c. Whether there are any alternative remedies available to CWHL and whether all alternative remedies have been exhausted by CWHL.

[58] It is common ground between the parties that CWHL is directly affected by the decision of the Defendant, who is the Minister with responsibility for town and country planning. It is equally agreed between the parties that there is no appellate procedure established by the Town and Country Planning Act to challenge the decision of the Defendant. In the circumstances, the Court has no difficulty finding that CWHL has exhausted the alternative remedy which is available to it.

Whether the Defendant's decision to refuse the Claimant's appeal was unreasonable, irrational, illogical and unlawful.

i. Whether the Defendant failed to comply with sections 13(2) and 28(A) of the Town and Country Planning Act.

ii. Whether the failure to comply with either or both sections invalidate the decision made in respect of the application.

[59] CWHL contends that the Defendant breached sections 13(2) and 28A of the Town and Country Planning Act, with respect to the stipulated time frames for the hearing of appeals and the delivery of decisions in relation to those appeals, and in respect of the person with the requisite authority to hear an appeal.

[60] In the Affidavit of Christopher S. Charley in Support of Fixed Date Claim Form for Judicial Review, Mr Charley, in his representative capacity, deponed as follows: -

> *"17. Pursuant to section 28A of the Act, the Defendant apparently appointed the Honourable Mr. Daryl Vaz, MP (hereinafter respectfully referred to as "Minister Vaz"), Minister Without Portfolio in the Ministry of Economic Growth and Job Creation, to hear, receive and examine the evidence on the appeal. However, to date, the Defendant has not provided documentary evidence of this appointment. The Claimant instead was advised by letter dated 31st July 2019 from the Ministry of Economic Growth and Job Creation that it would be advised of the date of the appeal, once it is set by the Minister…*
>
> *18. That the appeal was heard before and evidence taken by Minister Vaz, such appeal being heard, and evidence received in the matter on November 26, 2019. Assuming that the appointment of Minister Vaz took place at least from the date of the said letter dated 31st July 2019, the evidence was taken, and hearing of the appeal was held in excess of the twenty-one (21) day period after the appointment allotted by the Act. Accordingly, the appeal ought to have been heard by the Defendant himself, as mandated by the Act.*
>
> *19. The appeal was not heard by the Defendant.*
>
> *…*
>
> *23. The Decision was made far in excess of the ninety (90) days prescribed after the hearing of the appeal, contrary to section 13(2) of the Act. Indeed, the Defendant's decision was made almost a year to date after the hearing of the appeal.*
>
> *…*

> *25. The Defendant has not indicated whether he received any written report of the findings and recommendations made by Minister Vaz, and if so, what they were, such report having ought to have been provided to the Defendant, pursuant to section 28(A)(1)(b) of the Act."*

[61] The Court observes that this evidence has not been contradicted by the Defendant. In fact, at paragraph 4 of the Affidavit of Rollin Alveranga in Response to Affidavit of Christopher S. Charley in Support of Fixed Date Claim Form for Judicial Review, it is averred as follows: -

> *"4. In response to the alleged procedural irregularities highlighted at paragraphs 17, 18 and 23 of the Claimant's Affidavit, I am advised by my Attorneys-at-Law and do believe that any failure of the Defendant to hear the pertinent appeal himself after the alleged lapse of twenty-one days after the appointment of Minister Daryl Vaz, as prescribed by the Town and Country Planning Act, does not render the appeal proceedings and/or any decision resulting from such proceedings invalid or null and void. Neither does any failure of the Defendant to render a decision on an appeal within ninety (90) days of the appeal hearing mean that his decision can be properly impugned as being without legal effect."*

[62] The pronouncements of Lord Woolf MR in the authority of **R v Immigration Appeal Tribunal, ex parte Jeyeanthan; Ravichandran v Secretary of State for the Home Department**,[30] are instructive. Lord Woolf MR considered the approach to be adopted by the court in circumstances where there has been a procedural irregularity. He is quoted as follows: - [31]

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[30] [1999] 3 All ER 231

[31] Woolf MR referenced the pronouncements of Lord Hailsham of St Marylebone LC in the authority of **London and Clydeside Estates Ltd v Aberdeen DC** [1980] 1 WLR 182 at 188-190: '*The contention was that in the categorization of statutory requirements into "mandatory" and "directory" there was a subdivision of the category "directory" into two classes composed (i) of those directory requirements "substantial compliance" which satisfied the requirement to the point at which a minor defect of trivial irregularity could be ignored by the court and (ii) of those requirements so purely regulatory in character that failure to comply could in no circumstances affect the validity of what was done… In this appeal we are in the field of the rapidly developing jurisprudence of administrative law, and we are considering the effect of non-compliance by a statutory authority with the statutory requirements*

*"**The conventional approach when there has been non-compliance with a procedural requirement laid down by a statute or regulation is to consider whether the requirement which was not complied with should be categorised as directory or mandatory. If it is categorised as directory, it is usually assumed that it can be safely ignored. If it is categorised as mandatory, then it is usually assumed that the defect cannot be remedied and has the effect of rendering subsequent events dependent on the requirement a nullity or void or as being made without jurisdiction and of no effect**. The position is more complex than this and this approach distracts attention from the important question of what the legislator should be judged to have intended should be the consequence of the non-compliance. This has to be assessed on a consideration of the language of the legislation against the factual circumstances of the non-compliance. In the majority of cases, it provides limited, if any, assistance to inquire whether the requirement is mandatory or directory. The requirement is never intended to be optional if a word such as 'shall' or 'must' is used.*[32]

…

There are cases where it has been held that even if there has been no prejudice to the recipient … the non-compliance is still fatal. The explanation for these decisions is that the draconian consequence is imposed as a deterrent against not observing the requirement.

…

Because of what can be the very undesirable consequences of a procedural requirement which is made so fundamental that any departure from the requirement makes everything that happens thereafter irreversibly a nullity it is to

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affecting the discharge of one of its functions. In the reported decisions there is much language presupposing the existence of stark categories such as "mandatory" and "directory", "void" and "voidable", a "nullity", and "purely regulatory" ….'.

[32] In the authority of **Natt v Osman** [2014] EWCA Civ 1520 at [39]: Sir Terence Etherton made the following observation: "*As Lord Woolf MR observed in **Ex p Jeyeanthan** [2000] 1 WLR 354, 358, the words "shall" and "must" are both synonymous as denoting something which is required to be done as opposed to something which is intended to be merely optional. Both words impose an obligation but, detached from the statutory scheme…, they throw no particular light on whether the legislature intended non-compliance to result in invalidity and nullity*."

be hoped that provisions intended to have this effect will be few and far between. In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation that tribunal's task will be to seek to do what is just in all the circumstances.

…

… ***I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows: Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) …If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)***

Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver."

[Emphasis added]

[63] For present purposes, the Court must consider the proper interpretation to be applied to sections 28A(1)–(3) and 13(2) of the Town and Country Planning Act.

This is to determine whether the statute imposes a requirement on the Defendant which requires strict compliance. Secondly, the Court must consider whether there has been substantial compliance, or, alternatively, non-compliance, with these provisions, and, if so, whether that non-compliance is so material that it calls into question the legality of the Defendant's decision.

[64] In this regard, a careful examination of the relevant sections of the statute is warranted. Section 13(2) of The Town and Country Planning Act reads as follows: -

> *"13(2)* ***Where an appeal is brought under this section from a decision of a local planning authority or the Authority, the Minister shall make a determination within ninety days of the hearing thereof and may allow or dismiss the appeal or may reverse or vary any part of the decision of the local planning authority, or the Authority, as the case may be, whether or not the appeal relates to that part, and deal with the application as if it had been made to him in the first instance****.*
>
> *(3) Before determining any such appeal, the Minister shall, if either the applicant or the authority concerned so desire, afford to each of them an opportunity of appearing before and being heard by him.*
>
> *(4) Unless within such period as may be prescribed by the development order, or within such extended period as may at any time be agreed upon in writing between the applicant and the local planning authority, the local planning authority either –*
>
> *(a) give notice to the applicant of their decision on any application for permission*

to develop land, made to them under this Part; or

(b) give notice to him that the application has been referred to the Authority in accordance with directions given under section 12,

The provisions of subsection (1) shall apply in relation to the application as if the permission to which it relates had been refused by the local planning authority and as if the notification of their decision had been received by the applicant at the expiration of the period prescribed in the development order or the extended period agreed upon as aforesaid, as the case may be."

[Emphasis added]

[65] Section 28A of the Town and Country Planning Act provides as follows: -

28A. – (1) ***The Minister may, if he thinks fit, appoint a person or persons***

(a) To hear, receive and examine the evidence in an appeal; and
(b) To submit to him, for his determination, a written report of the findings and recommendations, within twenty-one days of the hearing of such evidence.

(2) ***A person or persons appointed under subsection (1) shall hear the evidence within twenty-one days of the date on which such appointment is made****.*

(3) Where such person or persons fail to comply with subsection (2), the Minister shall hear and determine the appeal in question."

[Emphasis added]

[66] Section 13(2) of the Town and Country Planning Act mandates the Minister to determine an appeal from a decision of the local authority or the Authority and to do so within ninety (90) days of the hearing of that appeal. After hearing an appeal, the Minister may allow or dismiss the appeal or vary any part of the decision of the local planning authority of the Authority and deal with the application as if it had been made to him in the first instance.

[67] Section 28A of the Town and Country Planning Act treats with the hearing, reception, and examination of evidence in an appeal. The section gives the Defendant a statutory discretion to appoint a person or persons to hear, receive and examine the evidence in an appeal. Such a person or persons are required firstly, to submit to the Defendant, for his [the Defendant's] determination, a written report of the findings and recommendations, within twenty-one (21) days of the hearing of such evidence. Secondly, a person or persons so appointed shall hear the evidence within twenty-one (21) days of the date on which such appointment is made. Finally, the section provides that where such person or persons fail to comply with the requirements of the section, the Defendant shall hear and determine the appeal in question.

[68] In the present instance, it is common ground between the parties that the hearing of the appeal occurred on 26 November 2019 and that no decision was delivered until October 2020. It is equally common ground between the parties that the Honourable Minister heard and received the evidence in CWHL's appeal. It is correct that the Town and Country Planning Act does not prescribe a method by which the appointment of a person or persons for the purpose of the hearing, reception, and examination of evidence in an appeal is to take place. The Court observes however, that there is no evidence before it, whether documentary or otherwise, to indicate when it is that the Honourable Minister was appointed for the purpose of the hearing, reception, and examination of the evidence in CWHL's appeal. Nor is there any evidence before the Court on the face of which it can determine at which point time is to begin to run when computing the

twenty-one (21) day period, which is stipulated in section 28A(1)(b) and (2) of the Town and Country Planning Act.

[69] It is equally instructive to note that the Defendant has not provided the Court with any reason for the delay between the time of the hearing of the appeal and that of the delivery of the Decision. That notwithstanding, the Court is prepared to accept that the Defendant made a decision and finding in respect of the appeal brought by CWHL. The Court finds that this is the purpose and objective of sections 13(2) and 28A of the Town and Country Planning Act. To that end, this Court is prepared to find that there has been substantial compliance with the requirements of these sections of the statute, even though there has not been strict compliance.

[70] In this regard, the Court is strengthened by the pronouncements of Lord Woolf MR in **R v Immigration Appeal Tribunal, ex parte Jeyeanthan; Ravichandran v Secretary of State for the Home Department**. The first question to be determined is whether the statutory requirement is fulfilled if there has been substantial compliance with the requirement. Secondly, the Court must determine whether there has been substantial compliance, even though there has not been strict compliance with the requirement. Thirdly, the Court must determine whether the non-compliance is capable of being waived.

[71] The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of the non-compliance goes to jurisdiction it will be said that jurisdiction cannot be conferred where it does not otherwise exist, by consent or waiver.

[72] The Court finds that the non-compliance on the part of the Defendant does not affect his jurisdiction to treat with the appeal brought by CWHL and is loath to find that the failure to adhere to the period prescribed by the statute renders his Decision or the decision-making process invalid.

Whether the Defendant treated with the application as though it had been made to him in the first instance, as contemplated by section 13(2) of the Town and Country Planning Act.

[73] By way of letter dated 25 October 2020, the Defendant dismissed the appeal of CWHL, stating: -

> *"**After careful consideration of technical reports and submissions made, I am satisfied that this type of land use cannot be supported at the proposed location**. My decision is therefore to dismiss the appeal, thereby upholding the refusal of planning permission by the Town and Country Planning Authority."*
>
> ***[Emphasis added]***

[74] Mrs Dixon Frith complains that the Defendant failed to demonstrate that he treated with the application of CWHL as though it had been made to him in the first instance, as contemplated by section 13(2) of the Town and Country Planning Act. It was submitted that the Defendant failed to demonstrate how he treated with the issues in dispute among the parties at the appellate stage, to include the following information: -

(a) that all the properties which abut the land were being used for commercial purposes, including commercial offices and that there was no residence which joined common boundaries with the land.

(b) that one hundred percent (100%) of the properties on Herb McKenley Drive, where the land is located, were being used for commercial and light industrial purposes, including a factory, gas station, car mart, warehousing facility, and professional offices (doctors', and lawyers' offices).

(c) that there has been a consistent and significant shift from residential use of properties in the area (which were a part of a residential area called Little Retreat), to commercial use, resulting in the area being now rezoned to commercial/office use as reflected in the Town and Country Planning (Kingston and Saint Andrew)

Provisional Development Order, 2017, including the Northern Mountain View Local Planning Land Use Proposals (Inset No. 10) of the 2017 Development Order.

(d) that properties at the back of the land, which are located on Latham Avenue (one road leading off Herb McKenley Drive), are being used for commercial purposes and that all the properties on Latham Avenue are being used for commercial purposes. In addition, Latham Avenue has a hotel, a security firm, a rehabilitation centre, a technology company, a photo and video studio and a computer software company. At the top of Latham Avenue (which leads to Old Hope Road), is a large multistorey commercial complex and at the corner of Latham Avenue and Herb McKenley Drive, there is a hotel (namely, Roosevelt Great House).

[75] A complaint is also made that the Defendant failed to demonstrate that he had any regard to the 2017 Development Order and whether CWHL's application for planning permission adhered to same. Mrs Dixon Frith maintained that the 2017 Development Order rezoned the area where the land is located for commercial use and that specifically, the area now falls within the Northern Mountain View Local Area Plan, to which Policy NMV U34 of the 2017 Development Order is applicable. It was submitted that the said Policy permits light industrial activities in areas zoned for commercial use and that the proposal of CWHL falls squarely within land usage permitted by the 2017 Development Order. Mrs Dixon Frith maintained that, nowhere in the Defendant's decision has he acknowledged that, nor has he demonstrated that he considered it.

[76] In this regard, the Court accepts the submissions of Mrs Dixon Frith.

[77] It is acknowledged that there is no common law duty to provide reasons in planning permission cases such as this. The law has, however, long recognized that where there is a decision to grant or refuse planning permission, the informed reader as well as the court should not be left with any real and

substantial doubt, as to the reasons for the decision and the material considerations which were considered in arriving at that decision.[33]

[78] There were several questions of fact which were in controversy between the parties at the appellate stage. These are questions which were ventilated at the hearing of the appeal, including the critical issue of whether the area where the land is located was predominantly a residential area. In those circumstances, it was incumbent on the Defendant to provide the reasons for his decision. Nor did he indicate that he received recommendations from the Honourable Minister, in accordance with section 28A(1)(b) of the Town and Country Planning Act, what those recommendations were and whether he considered them.

[79] The Court finds that the Defendant failed to demonstrate how he treated with the following material considerations which were highlighted during the appeal and which, CWHL maintains, were material considerations: -

(a) That the area where the land was located was rezoned for commercial use.

(b) That the properties immediately surrounding the land are all being used for commercial and light industrial purposes.

(c) That there is no residence adjoining the land which will be adversely affected by the proposed facility.

(d) That NWA approved the application for planning permission, with certain conditions attached, and that CWHL was willing to adhere to those conditions, in the construction of the gas station and convenience store.

(e) That the application for planning permission contained vapour recovery systems, which permitted a reduction of the setback requirements and that CWHL was willing to agree to the additional

[33] Per Lord President Emslie in **Wordie Property Co. Ltd. V Secretary of State for Scotland** 1984 SLT 345 at 348

requirements of being subject to the approval of the Ministry of Health and the Bureau of Standards of Jamaica in this regard.

(f) That by way of its Fixed Date Claim Form bearing Claim No. 2018 HCV 04903, filed in this Honourable Court on December 12, 2018, CWHL has sought a modification and/or discharge of restrictive covenants which are endorsed on the Certificate of Title for the land.

(g) That the owners of the adjoining and contiguous properties (including the church and the nursery on the opposite side) did not object to the application for planning permission (having been served with the relevant court documents for the modification of the restrictive covenants).

(h) That the Ministry of Health has not lodged any objections to the application for planning permission.

(i) That the Jamaica Fire Brigade has also approved the building proposal (both the Ministry of Health and Bureau of Standards of Jamaica were served with the application for planning approval and the court documents have also been served on the Ministry of Health).

(j) That CWHL has generally complied with all applicable Guidelines for the construction of a gas station, including those set out in the 2017 Development Order and the NEPA Policy Guidelines.

[80] The Court is strengthened in these findings by the pronouncements of G. Fraser J (as she then was), in the authority of **Michael Young & Ors vs Kingston and St. Andrew Municipal Corporation**.[34] At paragraph [83] of the judgment Fraser J stated that the review court must consider that there is now an offshoot ground

[34] **[2020] JMSC Civ 25**

of review for serious illogicality and irrationality. The court can enquire whether each decision made by the decision-maker has an evident and intelligible justification. In other words, it may not be enough to arrive at a reasonable decision. The decision-maker should reason clearly from facts to conclusions and should avoid any procedural missteps.

[81] De Smith, Woolf and Jowell, opined in their text **Judicial Review of Administrative Action**,[35] that the grounds for judicial review, that is, illegality, irrationality and procedural impropriety, are not exhaustive. In discussing "Rationality: logic, evidence and reasoning, the learned authors stated that although the terms of irrationality and unreasonableness are these days often used interchangeably, irrationality is only one facet of unreasonableness. A decision is irrational in the strict sense of that term if it is unreasoned, if it is lacking ostensible logic or comprehensible justification. Irrationality may sometimes be inferred from the absence of reasons.[36]

[82] In the present instance, the Court accepts the submission of Mrs Dixon Frith that the decision and finding of the Defendant do not condescend to provide particulars of the reasons for the Decision and that the failure to give reasons, in the circumstances of this case, renders the Decision unreasonable, irrational, and illogical.

[83] In the result, this Court is of the view that an Order of Certiorari ought to be granted to quash the decision and finding of the Defendant, which was made on 25 October 2020. The Court also finds that the matter ought to be remitted for the Defendant to hear and determine the appeal of CWHL challenging the decision of the Town and Country Planning Authority, which was made on 21 May 2019, and for the Defendant to deal with the application of CWHL as though it had been made to him in the first instance.

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[35] 5th edition, at page 294

[36] See – **Judicial Review of Administrative Action, 5th edition, pages 559 and 561**

DISPOSITION

[84] It is hereby ordered as follows: -

1. An Order of Certiorari is granted to quash the decision and finding of the Defendant, which was made on 25 October 2020.

2. The matter is remitted for the Defendant to hear and determine the appeal of the Claimant challenging the decision of the Town and Country Planning Authority, which was made on 21 May 2019, and for the Defendant to deal with the application of the Claimant as though it had been made to him in the first instance, and the Defendant is required to do so within the timeline stipulated in section 13(2) of the Town and Country Planning Act.

3. The Order of Mandamus against the Defendant, which is sought at paragraph 2 of the Fixed Date Claim Form, which was filed on 6 May 2021, is refused.

4. The Declaration sought at paragraph 3 of the Fixed Date Claim Form, which was filed on 6 May 2021, is also refused.

5. The issue in relation to the costs of the Fixed Date Claim Form, which was filed on 6 May 2021, is reserved.

6. The Claimant's Attorneys-at-Law are to prepare, file and serve these Orders.