FOR IMMEDIATE RELEASE
1st September 2023

Court of Appeal Rules Grand Court Judgment Erroneous and DOE Erred in Law, but Remits Matter to CPA for Reconsideration

George Town, Grand Cayman— 1st September 2023 — The Central Planning Authority (the "CPA") is in receipt of the Cayman Islands Court of Appeal's ("CICA's") judgment in respect of the CPA's appeal of the Grand Court's decision on the Judicial Review application brought against the CPA by the National Conservation Council ("NCC"). At the commencement of the hearing of the Appeal, the CICA confirmed that Justice Walters (Acting) had fallen into error and, on that basis, the decision of the Grand Court was rejected by the CICA. The CICA also ruled that the directive issued by the Director of Department of Environment (DOE) to the CPA to refuse planning permission was unlawful, since pursuant to Section 41 (3) and (4) of the National Conservation Act ("the NCA"), it is for the CPA to determine for itself whether an adverse effect is likely, before it refers the matter to the NCC. Consequently, the NCC/DOE cannot pre-emptively direct the CPA to refer the matter to the NCC based on adverse effect. However, since the Appeal was quashed on other grounds, namely on the basis of inadequate reasons regarding the CPA's consideration of Section 41 of the NCA. The matter has therefore been remitted by the CICA to the CPA for reconsideration. This means that the CPA will have to consider the planning application again, taking account of the CICA's guidance. In so doing, the CPA will endeavour to provide more detailed reasons for its decision regarding its consideration of Section 41 of the NCA. The CPA also understands that the CICA judgment demonstrates the need for significant improvement in the interaction between the CPA and the NCC in respect of the planning applications process.

For all those reasons, the CPA believes its Appeal was warranted and the CICA's decision has made it clear why it was necessary for the CPA to bring the Appeal. The CICA's judgment transcends the subject planning application and confirms that the Director of the DOE must follow the provisions of the NCA and further that the NCA does not give the Director of DOE the statutory remit to unlawfully interfere with or usurp the functions of the CPA.

By way of background, judicial review litigation was commenced against the CPA by the DOE/NCC in 2022 when the DOE/NCC disagreed with a decision of the CPA to grant planning permission for an application for a replacement cabana and seawall on Boggy Sands Road purportedly in contravention of a directive issued by the Director of the Department of Environment ("the DOE") to refuse planning permission. Such directive was made on the basis that the construction would cause turbidity and sedimentation in the adjacent Marine Park protected area. It is important to note that the application related to the **replacement of an existing** seawall and cabana, both of which are structurally unsound and which all parties involved have accepted will eventually collapse into the ocean unless repaired, replaced or removed. It should also be noted that the removal of the seawall entirely would seem to not be a viable solution, as this would cause a break in the seawall/revetment system *in situ* along the side of that area of Boggy Sands Road and extending the length of Mary Molly Hydes Road, most of which seawall was built by the Government, and this would eventually undermine the road itself by wave action, possibly cutting off all access to Boggy Sands Road. The owner of the property ("the Applicant") had applied to the CPA to replace the existing structures with a smaller, curved seawall, which would be set back further from the sea and behind that seawall a new single storey cabana was proposed, to replace the existing compromised structure. The CPA first considered the legality of the directive it had received from the DOE and decided that it was unlawful, a position which was

ultimately accepted and conceded by the DOE during the proceedings in the CICA. After deciding that the directive was unlawful, the CPA went on to consider the application and its decision to grant permission was then made on the basis that the serious structural defects in the existing seawall and cabana justified the proposed remedial works. The CPA took into account that the new seawall would be smaller and set back further form the sea and would be curved, as had been previously recommended by the DOE. On that basis the CPA decided the proposed development would be less of a threat to the environment than the existing structure was. It is important to note that the DOE's concern was not the proposed development itself*,* but that runoff during the construction period would somehow enter the protected area. Given that the replacement seawall was to be constructed inside of the existing seawall (which would only be removed once construction was completed), and given that the Applicant had presented a number of additional measures which it would take to prevent any run-off from entering into the ocean, including pumping away any surface water runoff, the CPA granted planning permission to replace the existing, structurally defective development with a smaller one, which in their view was an improvement in all aspects, including environmental.

Unfortunately, rather than trying to resolve its dispute with the CPA or asking Cabinet to assist in resolving the difference in opinions, as is provided for by the Development and Planning Act, the DOE took the view, despite receiving legal advice from the Attorney General to the contrary, to submit an application to the Grand Court for a judicial review of the CPA's decision to grant planning permission. Furthermore, such action was taken even before the expiry of the timeframe allowed for CPA to respond to the DOE's letter before action, in breach of a long-standing Direction of the Grand Court regarding the process in respect of Judicial Review applications. In those circumstances, and since it was clear that the DOE/NCC was not interested

in discussing alternative ways of resolving its grievance with the CPA, the CPA had no choice but to, in the first instance, defend itself against the judicial review in the Grand Court and then, consequently, to appeal the flawed decision of the Grand Court to the CICA.

The CPA understands that the CICA has remitted the application back to the CPA on the basis that the written decision of the CPA did not give sufficient detailed reasons for its decision that the approval of the application would not likely have an adverse effect on a "Protected Area". While the CPA reserves its right to appeal the CICA judgment to the Privy Council, subject to any such appeal, the CPA will carefully consider the CICA's guidance and, going forward, the CPA will seek to improve its decision making and recording process accordingly. Had the CPA known at the outset of the Grand Court proceedings that the NCC's main grievance with its decision would ultimately be a lack of sufficient written reasons for the CPA's decision, rather than the original grounds of judicial review filed by the DOE/NCC, the CPA would have been able to readily resolve that issue without the need to expend significant time and legal fees on this matter, contesting issues which were subsequently accepted, abandoned and/or conceded by the DOE/NCC.

Obviously, the CPA understands that the judgment of the Court of Appeal clearly confirms that communication and consultative processes between the CPA and the NCC need to be streamlined and enhanced so as to operate on a more cooperative basis. The CPA is encouraged that it is now an agreed position between the parties, which has been accepted by the CICA, that the Director of DOE's directive was unlawful, notwithstanding that the original Judicial Review was made in direct challenge of the CPA's decision that such directive was unlawful. The CPA is also grateful that it is now an agreed position (despite it also initially being a contentious matter in the Grand Court proceedings) that it is the CPA, not the DOE, who must decide whether it is

obliged to refer any application under either Section 41 (3) or 41 (4) of the National Conservation Act ("NCA"), on the basis of there likely being an adverse effect.

The CPA also notes the recent appointment of a new NCC Board and is hopeful that going forward, rather than the Director of Environment pre-emptively issuing unlawful "directives" to the CPA, the NCC and the CPA can now work together in the performance of their statutory functions by way of an open and transparent process. The CPA feels strongly that this process should also include the applicants for planning permission, as the CPA believes this is what was intended by Parliament with the advent of the NCA. The CPA believes that such cooperation will foster a working relationship that better reflects the open and transparent process required by the NCA itself as well as being more concordant with the provisions of the Constitution and the established principles of the rule of law, as regards the functions of public authorities.

Notwithstanding the history of this matter and the CPA's right to appeal the CICA judgment, the CPA looks forward to working with the NCC to settle and streamline the consultation and review process moving forward. Furthermore, the CPA is hopeful that, in any event Cabinet will assist in settling any issues between the CPA and NCC, in order to avoid further unnecessary litigation between the two public authorities and/or affected interested parties. In that regard, the CPA trusts that in the event of any future disputes between the CPA and NCC, Cabinet will assist in the expeditious resolution of such disputes by way of either its appellate authority under Section 39 of the NCA or by way of the process prescribed in Section 51 (2) of the DPA.

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IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS

CICA (Civil) Appeal No. 022 and 025 of 2022
(Formerly Cause No. G0207 of 2021)

The Central Planning Authority

Appellant

and

The National Conservation Council

Respondent

and

Cayman Property Investments Ltd

Interested Party

Before:	**The Hon Sir Richard Field, Justice of Appeal** **The Rt Hon Sir Alan Moses, Justice of Appeal** **The Hon Sir Michael Birt, Justice of Appeal**
Appearances:	**Sir Jeffrey Jowell KC and Mr Tom Cleaver, instructed by Mr. J. Samuel Jackson and Ms Selina Tibbetts of Jackson Law for the Appellant** **Mr Chris Buttler KC instructed by Ms Kate McClymont of Nelsons Legal for the Respondent** **Mr Tom Lowe KC instructed by Mr Michael Alberga of Travers Thorp Alberga for the Interested Party**
Heard:	**17 – 19 May 2023**
Draft circulated:	**18 July 2023**
Judgment delivered:	**1 September 2023**

JUDGMENT

The Rt Hon Sir Alan Moses

Introduction

1. This appeal is concerned with the relationship between the duties of the National Conservation Council ("the NCC") in relation to protection of the environment under the National Conservation Act 2013 ("the NCA") and the responsibilities of the Central Planning Authority

("the CPA") in relation to the determination of applications for planning permission under the Development and Planning Act (2021 Revision) ("the DPA"). That relationship and the way the NCC's statutory responsibilities are to be integrated with the CPA's planning decisions are contained in section 41 of the NCA.

2. The issue has arisen out of the application for planning permission by Cayman Property Investments Ltd ("the Interested Party") for the reconstruction of a cabana and sea-wall at the northern end of Boggy Sands Road. No-one has seriously disputed that that work posed a risk to the environment, though its nature and degree were contentious. But the CPA granted planning permission on the basis that the conditions it imposed would alleviate or eliminate that risk. The NCC challenged the legality of that decision by way of judicial review before The Hon Mr. Justice Walters (Actg.). It contended that under the statutory scheme of the NCA, the CPA was required to obtain the approval of the NCC before the CPA granted planning permission and that it was for the NCC, not the CPA, to reach a final decision as to whether the proposed conditions were adequate to eliminate the risk.

3. The history of the planning application shows how the issue in this appeal has arisen. In 2009 planning approval was granted for a cabana and sea-wall. They were constructed in accordance with that permission. Concerns were expressed at the time (see CPA Agenda for meeting 29 April 2009) at the ineffectiveness of the sea-wall to prevent erosion and on its effect on the coastal environment. The site is adjacent to the Seven Mile Beach Marine Park, a Marine Protected Area under the NCA.

4. According to the Director of the Department of Environment ("the Director"), the site had a history of erosion, under what is described as 'normal circumstances' and the beach in that location had not existed for at least five years. This the Director attributes to the construction of hard structures such as the sea-wall on an "active beach".

5. When the sea-wall began to fail and lose structural integrity, the Interested Party made an application for planning permission dated 3 December 2020 to replace the existing cabana with a three- storey habitable cabana and to undertake rehabilitation works on the sea-wall. At an earlier pre-planning permission meeting the Department of Environment had suggested that if the sea-wall was to be reconstructed it should include a curved seawall.

6. On 16 April, 2021 the Director sent a memorandum to the CPA. She noted that the applicant had not modified its proposals and reached the conclusion that although the proposed works might extend the longevity of what she described as "this ill-placed structure" the force of the sea and environmental changes would increase the vulnerability of the site. She "respectfully" directed refusal of the planning application on the grounds that the proposed development would result in

the detrimental alteration of a Marine Protected Area and the environment generally (including the turtle nesting habitat). It is of importance to note that the Director purported to give that direction under section 41(5) of the NCA, an exercise of power which it is now accepted was not open to the NCC at that stage.

7. By its decision dated 6 May 2021 the CPA refused this first application. It did not refer to the memorandum or to the grounds on which the Director had relied. The CPA took the view that the proposed development failed to comply with regulations relating to the distance any development should be set back from the sea.

8. The Interested Party therefore decided on a modified approach in a second application. It is this application which is the subject of the appeal. By its second application the Interested Party sought planning permission for removal of the existing cabana and a new one storey cabana and a new sea-wall. On 10 June 2021, the CPA provided the Department of Environment with a copy of that second application. The Director again concluded that the proposed development would have an adverse effect on the adjacent Marine Protected Area. Her memorandum dated 1 July 2021 stated that there were "absolutely no mitigating circumstances which could justify a departure from the legally prescribed setbacks in this location and, in our view it would be negligent to permit development on this site." The memorandum set out in some detail concerns as to the impact of sedimentation and turbidity on the marine environment and Marine Protected Area. It noted that sedimentation was one of the biggest potential sources of reef degradation. The Director purported to be acting on behalf of the NCC pursuant to a delegation under section 3(13) of the NCA. The memorandum concluded that it was "futile to try to permit further development on this problematic site" and directed the CPA to refuse planning permission pursuant to section 41(5) of the NCA. Again, it is accepted that that direction was not open to the NCC at that stage.

9. On 1st September 2021, the CPA considered this second application and granted planning permission subject to a number of conditions. On this occasion, the CPA did focus attention on the NCC's purported direction and took the view that it was unlawful. It resolved that planning permission should be granted subject to a number of conditions requiring, amongst other things, that a new sea-wall be constructed on the landward side of the existing sea-wall and that the existing deteriorating sea-wall should not be removed until the new wall had been completely constructed. The conditions further required that a silt screen should be installed fully enclosing the work area and that stockpiled materials should be kept away from the sea edge.

10. Just as it had done in relation to the first planning application which it had previously refused, the CPA referred to the Development and Planning Regulations (2021 Revision) requiring a minimum setback from the high water mark but on this occasion took the view that a lesser

setback should be allowed. It set out its reasons for granting permission; they included a record of its view that the direction it had received from the NCC in the memorandum dated 1 July 2021 was unlawful.

11. I should emphasise, at this stage that this appeal does not turn on the rival views as to the planning merits of what was proposed. On the contrary, it turns on whether the CPA could lawfully grant planning permission, having regard to the legislative scheme under the NCA.

12. The NCC judicially reviewed the CPA's decision to grant planning permission. By a judgment dated 23 August 2022, Walters J quashed the CPA's decision. But he did so on grounds that neither side nor the Interested Party seek to uphold. In those circumstances, the NCC seeks to uphold the Judge's decision to quash the grant of planning permission on other grounds. The Judge decided the case on a ground that none of the parties had argued. It is easier to identify the point on which the Judge, in part, based his decision once the relevant legislative provisions have been analysed. At the heart of this appeal, lies the proper construction of section 41 of the NCA.

The Legislative Scheme

13. The relevant provisions are set out in Annex 1. Although two of the central issues in this appeal turn on section 41, it is also relevant to record the creation and function of the NCC by the NCA.

14. Section 18 of the Cayman Islands Constitution Order 2009 enshrines the protection of the environment, including limiting pollution and securing ecologically sustainable development, within the Constitution of the Islands. The NCC was established by section 3 (1) of the NCA. Section 3 (9) identifies its functions, which include "promoting the biological diversity and the conservation and sustainable use of natural resources in the Islands" (section 3(9)(b)) and "recommending and maintaining protected areas" (section 3 (9)(c)).

15. Section 7 of the NCA confers power on the Cabinet, after consultation with the NCC, to designate any area of Cayman waters as a protected area. The National Conservation (Marine Parks) Regulations 2021 designate the Seven Mile Beach Marine Reserve Zone as a protected area. The NCC took the view that this protected area was at risk as a result of the proposed development works.

16. The CPA was established by section 3 of the Development and Planning Act (now 2021 Revision). By section 5(1) the CPA is under a duty to "secure consistency and continuity in the framing and execution of a comprehensive policy approved by the Cabinet with respect to the use and development of the land in the Islands". The current policy is contained in the Development Plan 1997 (see Part II of the DPA). Under Part III of the DPA, development is controlled by

consideration and determination of planning applications made to the CPA (section 13). Generally, permission should not be given where it is at variance with a development plan (section 13). Subject to a right of appeal, the decision of the CPA is final (section 15(5)).

17. The manner in which the NCC's statutory responsibilities are to be integrated into the CPA's planning decisions is prescribed by section 41.

18. Fundamental to the legislative mechanism by which section 41 seeks to ensure protection of the environment, is the meaning of "adverse effect" under section 2 of the NCA.

> "**Interpretation**
> In this Law —
> "**adverse effect**" means an effect that may result in the physical destruction or detrimental alteration of a protected area, a conservation area, an area of critical habitat or the environment generally and includes —
> the discharge of pathogens, dissolved or suspended minerals or solids, waste materials or other substances at levels that may be harmful to wildlife or the ecological or aesthetic value of the area;"

19. It was not disputed that the CPA was an entity within the meaning of section 2 of the NCA. Accordingly, section 41(1) imposed on the CPA an obligation to ensure that its decisions did not "jeopardise the protection and conservation of a protected area or any protected species or its critical habitat". This strict overall obligation is an important aid to the proper construction of section 41, read as a whole.

20. The NCC, for its part, is under an obligation, imposed by section 41(2) to issue guidance notes as to the duties of entities under the NCA. This specific duty under section 41(2) is in addition to the general power conferred by section 3(12) to make guidance notes for the "purpose of giving effect to the provisions of the Act". The guidance notes may include "procedures for consultation by entities pursuant to section 41(3)".

21. By section 41(3), before granting planning permission which would or would be likely to have an adverse effect, the CPA is under a duty to consult with the NCA, "in accordance any guidance notes issued by the Council" and to take into account the NCA's views. The effect of section 41(3) when read with the definition of 'adverse effect' in section 2 is that the duty of consultation and the duty to take into account the NCC's views on a proposed grant of permission is triggered in any case where the proposed development would be likely to create a risk to the environment or to any natural resource. Because of the use of 'may' in the definition section (section 2) this threshold triggering those duties is low.

22. The NCC has issued guidance notes ("the Guidance") relevant to the proposed development in the instant case. The Guidance provides that:

> "In order to comply with the Law all government entities shall consult with the Council if they are taking any action, granting any permission……which matches any of the following "trigger" conditions."

23. There are then set out a number of Location Triggers, Activity Triggers and Strategic Triggers. The Guidance also sets out how the NCC proposes to assess consultations and particularly the characteristics of the proposed action and its potential for adverse impact.

24. The Location triggers for consultation relevant to the Interested Party's proposed development are shown on a Screening Map and included "Activities occurring within 500 feet landward of the high water mark (A)(i)) and "Activities adjacent to a protected area"(A)(iv). The Screening Map identifies the land within the 500 foot boundary and that includes the location of the proposed development in the instant case.

25. The NCC contends that the CPA was bound to consult with the NCC, under section 41(3), because the location of the proposed development, as identified in the Guidance, itself triggered the duty to consult. This contention prompts the CPA to submit that the Guidance is *ultra vires* because it purports to vary and expand the obligation to consult imposed by section 41(3). The obligation to consult is triggered, submits the CPA, only by the circumstance that the proposed action, such as planning permission, would or would be likely to have an adverse effect. The Guidance introduces, so it is argued, a new trigger.

26. I do not agree. The Guidance is guidance not law. It does no more than identify the circumstances in which proposed action, such as a proposal to grant planning permission, creates a risk of harm to the environment. It does not enlarge the circumstances in which the CPA is required to consult, it merely identifies those which, according to the NCC's guidance, will create a risk which will trigger the duty to consult.

27. Since the Guidance is not law it was open to the CPA to disagree provided it put its mind to the Guidance and gave a reasoned basis for disagreement. But in the absence of a considered decision and good reason to deviate from the guidance, the CPA was required to follow it (see *R (on the application of TG) v Lambeth LBC* [2011] EWCA Civ 526 [2011] 4 All ER 453 at 461b).

28. In this case the CPA never considered the Guidance and never provided any basis for not following it. In those circumstances it was bound to consult the NCC and take account of its view, *in pursuance of section 41(3).*

29. The NCC does not rely on the CPA's failure to consult as a ground of judicial review because, although the CPA never had 41(3) in mind, it had obtained the views of the NCC and had those views before them when it considered whether to grant planning permission. It contends, therefore, that any failure to follow the statutory route signalled in section 41(3) has no legal consequence. The requirements of section 41(3) had effectively been fulfilled by another route.

30. The CPA, so it contends, had properly consulted the NCC in fulfilment of its obligation under section 7 of the DPA (2021 Revision). This requires the CPA "to the greatest possible extent….to consult with departments and agencies of the Government having duties or aims or objects related to those of the CPA". But this process of consultation consisted of no more than sending to the NCC a list of all the planning applications the CPA had received at regular intervals, not identifying those which fell within the NCC's Guidance or those which created, in the CPA's opinion, a risk of harm to the environment.

31. I agree that this failure to follow the specific requirements of section 41(3) has no legal consequence in the instant appeal because the CPA was well aware of the objections of the NCC. But it is important to emphasise the duty under section 41(3) and its importance. Consultation under section 7 of the DPA is no substitute for fulfilment of the duty under section 41(3) of the NCA. The failure to pay any heed to the Guidance or to section 41(3) had a serious consequence when it comes to the central issue which arises under section 41(4). The sole reliance on section 7 of the DPA and the disregard of section 41(3) appears to have diverted the CPA's attention away from the requirements of section 41(4). Had the CPA paid regard to section 41(3) it would have considered whether its proposed grant of planning permission, would or would be likely to have an adverse effect. By mere notification under section 7, it failed to consider that vital question posed under section 41(3). Focus on section 41(3) would or should inexorably have led to consideration of the same question, but specifically in relation to a protected area or the critical habitat of a protected species under section 41(4). Failure to ask the right question under section 41(3) almost inevitably leads to failure to ask the right question under section 41(4).

32. Section 41(4) poses the statutory question as to whether the grant of planning permission on this site would be likely to create a direct or indirect risk to the Seven Mile Beach Marine Reserve Zone as a protected area? The obligation to apply for and obtain the approval of the NCC before taking any action, including the grant of permission, arises whenever that action would or would be likely to create a direct or indirect risk to a protected area.

33. The answer Sir Jeffrey Jowell proffers in his powerful submissions on behalf of the CPA is that there was no risk to the protected area. Section 41(4) refers to the action of the CPA not to the action of the developer. The action which the CPA proposed, namely the grant of permission, would not have an adverse effect on the adjacent protected area because the permission was subject to conditions which would so reduce or eliminate the risk posed by the development works that permission would not be likely to have any adverse effect on the marine zone. Measures such as the silt screen would adequately protect any escape of harmful material such as might cause harm to that zone. It is not possible, on a proper construction of the sub-section, so Sir Jeffrey submits, to ignore the conditions to be imposed because they form part of the action the CPA proposed to take.

34. This submission focusses on the words within section 41(4). I agree, if one confines attention to the words "any action", they are apt to include not only the proposed grant of planning permission but also the conditions to which that permission was to be subject.

35. But in my judgment it is not legitimate to construe the subsection without regard to the provisions of section 41 as a whole and its context within the NCA. The CPA's submission ignores the force of section 41(5). Section 41(5)(b) requires the NCC to direct refusal of planning permission where the NCC considers that the adverse impact of the proposed grant of planning permission cannot satisfactorily be mitigated by conditions. This provision is of significance in two respects. First, the statute draws a distinction between the proposed action under subsection (4) (see the opening words to subsection (5)) and mitigation by conditions. This demonstrates that adverse impact of the proposed action means adverse impact foreseen without consideration of any suggested conditions. The concept of adverse effect in subsections (3) and (4) must be the same as the adverse impact to which subsection 5(b) refers.

36. Second, it is plain that the power to consider and decide the extent to which conditions mitigate adverse effect or impact is conferred on the NCC. Similarly, in a case where the CPA does not consider that conditions are necessary, the NCC has the power to direct that permission should only be given subject to conditions under subsection (5)(a). If the CPA were correct, then the CPA can side-step the duty to consult and the power of the NCC to reach a final decision as to the efficacy of conditions. By reaching its own, final, decision as to whether or not conditions will satisfactorily reduce or eliminate the risk of harm, the CPA subverts the plain intention of sections 41(4) and (5) which require the approval of the NCC and, in a case where conditions are proposed, require the NCC to make the final decision. On the CPA's construction, it could grant permission without informing the NCC of its proposed conditions or affording the NCC any opportunity whatever for consideration whether the conditions proposed would be effective or not. So, to construe section 41(4) in the way proposed by CPA diminishes the functions of the

NCC and its responsibilities of protection of the environment. It is inconsistent with the overriding duty within section 41(1).

37. Moreover, the CPA's construction deprives subsection (5)(a) of full effect. The NCC would only be empowered to suggest conditions in cases where the CPA took the view that adverse impact could *not* be mitigated by any conditions whereas the NCC took the contrary view that it could. This seems a surprising and limited role for the NCC under subsection 5(a).

38. Properly construed, therefore, adverse effect is to be assessed by the CPA, under both section 41(3) and section 41(4), prior to consideration of any conditions. The risk of harm posed by "any action" must be assessed prior to consideration of the conditions which might eliminate that risk.

39. Section 42 also underlines the responsibility conferred on the NCC in relation to conditions. It is for it to direct a schedule to ensure compliance and to decide whether the conditions have been complied with.

40. Once it is appreciated that, on a proper construction of section 41(4), the question whether the proposed grant of planning permission will or is likely to have an adverse effect must be considered without consideration of mitigating conditions, it becomes plain that, in the instant appeal, the proposed permission would be likely to have an adverse effect on the adjacent protected area. The very fact that the CPA appreciated that the development could not go ahead without the imposition of conditions demonstrates conclusively that the grant of permission would be likely to have an adverse effect. The Interested Party did not dispute this.

41. However, the Interested Party raised the issue as to the correct identification of the entity responsible for considering and assessing the risks likely to result from the grant of permission. The Interested Party identifies them as "construction risks". They concern, so it contended, harm resulting from the construction of a new sea-wall, and how waste-water is to be handled during construction.

42. The Interested Party submits that the entity responsible was the "Building Official" responsible for ensuring compliance with the Building Code Regulations (2022 Revision) made by Cabinet pursuant to its powers under Section 42 (1) (c) (e) and (f) of the Development and Planning Act (2021 Revision). By Regulation 2, the Building Official is the Director of Planning. Mr Lowe KC, on behalf of the Interested Party submitted that, if following our decision, the application for permission is remitted to the CPA, it may then emerge that the real risk can and should be met by enforcement of the Building Regulations, which are the appropriate method for obviating harm to the environment caused by construction works.

43. In my view, nothing Mr Lowe KC submitted undermines the essential statutory duty imposed on the CPA to consider whether the permission it proposes will or is likely to have an adverse effect, and to seek approval from the NCC, should it reach the conclusion that it does.

44. The fact that other entities may also have responsibilities under section 41 does not absolve the CPA of its responsibility.

45. Further, the Building Regulations do not themselves contain provisions for the protection of the environment, even though their enforcement may have the effect of safeguarding against adverse effects. The primary responsibility is that of the CPA, subject to consultation and, in cases falling within section 41(4), to the approval of the NCC.

46. In short, the CPA was required to seek the approval of the NCC under Section 41(4). It never did so. By this failure the NCC was deprived of any opportunity to consider the conditions proposed, of which they remained ignorant.

47. That is sufficient to dispose of the appeal. The grant of planning permission was unlawful and must be quashed on that ground.

The Judge's Reasons and the NCC's error under section 41(5)

48. This analysis of section 41 enables me, at this stage, to explain why all parties rejected the decision of the judge and accepted that the appeal should either be allowed or dismissed on other grounds.

49. It is agreed that under section 41(4) it was for the CPA, which proposed to take the action of granting planning permission, to consider whether the grant was or was likely to have an adverse effect. The judge concluded that it was solely for the NCC to determine whether the grant of planning permission would or would be likely to have an adverse effect and to direct that the CPA refer the proposed grant to the NCC (see Judgment [62]).

50. The Judge fell into error. The question whether the planning permission created the risk of harm to the environment or to a protected area was for the decision of the CPA. An appeal against that decision may be made to a Tribunal under section 48(1) of the DPA. It is unnecessary to dwell on the Judgment, save to say that it was not open to the judge to rely on records of Parliament in Hansard. No notice had been given by any party of an intention to do so, none had relied upon such records and it was unnecessary to do so, in any event.

51. There is one point to which I should, however, refer. If the issue whether any action would or would be likely to have an adverse effect arises in judicial review, the question remains as to the standard the court should adopt on such a review. Does section 41(4) identify a precedent fact for the court to determine or is the question whether the proposed action would or would be likely to have an adverse effect for the entity to decide, leaving the court with the limited jurisdiction to overturn that decision on conventional judicial review grounds? But, since it is not relevant to this appeal and has not been fully argued, I would leave open this issue for the time when it becomes necessary to decide it.

52. The other point which can now more fully be explained relates to the NCC's direction under section 41(5) to the CPA both on the first planning application, when the CPA ignored it, and on the second, when it took the view that the direction was unlawful.

53. It was unlawful, because under the statutory scheme it was not open to the NCC to give that direction prior to the CPA seeking approval under section 41(4). The duty to direct under section 41 (5) only arises following the sequence of events identified in section 41(4), namely after approval is sought and after the NCC has considered whether to give approval, with or without conditions or to direct refusal. In the case of both the applications, the NCC's direction was premature. But that did not remove the obligation of the CPA to comply with its own duties of consultation under section 41(3) and its duty to consider the question of adverse impact and to seek approval under section 41(4).

Failure to consider section 41(4) at the CPA's Planning Meeting

54. As I have indicated, the appeal could be dismissed on the sole ground that despite the fact that the CPA was bound to conclude that the proposed grant of planning permission would or would be likely to have an adverse effect on a protected area, it failed to seek the approval of the NCC under section 41(4). But there are further grounds on which the NCC relied, in the event that its construction of section 41(4) was not accepted by this court. Those grounds are of importance because they serve to underline the importance of considering the statutory question posed by section 41(4) (and for that matter section 41(3)), namely whether there was a risk to the environment such as to trigger the duty either to consult or to seek approval.

55. The NCC contends that the record of the meeting at which planning permission was considered and of the reasons for the grant, show clearly that the CPA never considered the issue of adverse effect under section 41(3) and following that failure, it never considered that issue under section 41(4). The CPA contends that, on a fair and proper reading of the record of its meeting at which permission was granted, it can be inferred that it did consider that question.

56. Sir Jeffrey, on behalf of the CPA rightly reminds us that it is wrong to subject the record of the discussion or the reasons to some process of Talmudic analysis. The mere fact that some point is not specifically mentioned ought not to lead to the inference that it was ignored, if all the circumstances show that it must have been considered. It is plain, he submits, that the CPA did have in mind the environmental harm the work might cause because it imposed conditions which sought to alleviate that harm.

57. It is important, however, to follow the sequence of information in front of the CPA before it took its decision. The CPA had before it, as I have already recalled, the Memorandum from the Director dated 1 July 2021. It was aware of the strength of that opinion (e.g. *no mitigating circumstances .....negligent to permit development*).

58. The Planning Department's Analysis refers to a number of specific Issues, such as historic overlay, highwater mark, side and front setbacks, and then asks the members whether the letter submitted by the developer offers "sufficient reason and exceptional circumstance to support the submitted development design".

59. The members of the CPA present were addressed by representatives of the Interested Party. It is of note that one of their representatives gave his opinion that the CPA had "discretion to approve the development and was not bound by the comments of the NCC". But no mention was made of sections 41(3) and (4).

60. The CPA discussed the planning merits of the proposal and their observations are recorded. They observed that the current sea-wall had become compromised and was in desperate need of repair or replacement. The proposed new design for the cabana was a "huge improvement". They noted that the proposal would result in redevelopment of an existing site and not a vacant greenfield site. It observed that the Department of Environment had endorsed the use of a curved sea wall.

61. Following those discussions and observations the CPA granted permission, subject to the conditions to which I have already referred. It noted the unlawfulness of the section 41(5) direction. It recorded that it had "fully considered" the advice submitted by the DOE. The suggestion by the NCC that there should be a "managed retreat" and removal of all structures was not part of the application before the CPA. It also took the view that some of the advice was inconsistent.

62. It is clear that the CPA's decision was taken without any regard whatever to its obligation under section 41(4). Under that subsection, the CPA was bound to ask itself whether the proposed planning permission would or would be likely to have adverse effects. If it took the view that it would not it was bound to say so and explain why. Even if, contrary to my view as to the meaning and effect of section 41, it took the view that there was no likelihood of adverse effect

because of the conditions it was imposing, then it should have said so and explained why it was satisfied that the conditions would sufficiently reduce or eliminate the risk. No reference was made as to whether it should obtain the approval of the NCC or as to why it considered itself free to grant planning permission, absent such approval. The absence of any specific reference to adverse effect, coupled with the papers and analysis laid before the members and the reasons recorded, shows that plainly no thought was given to section 41(4). That too is fatal to this appeal.

Reasons for Rejecting the Director's Opinion

63. Nor did the CPA set out or explain the reasons why it rejected the Director's views. The Director's concerns were, in essence, as to erosion, construction and as to the danger of material being washed into the protected zone. She spoke of "*deleterious effects on the Marine* Reserve, *through the discharge of dissolved or suspended materials or solids that may be harmful to the ecological or aesthetic value of the area*".

64. If the CPA was to disagree with the statutory conservation body and the statutory consultee, namely the NCC, as to the views expressed on a subject within its expertise, it was incumbent on the CPA to give cogent and compelling reasons for departing from those views. (See *Shadwell Estates Ltd v Breckland District Council* [2013] EWHC 12 (Admin) per Beatson J [72]and Owen J in *R (on the application of Akester) v Department for Environment Food and Rural Affairs* [2010] EWHC 232 (Admin)). Unfortunately, the CPA's failure to have regard to its duties under sections 41(3) and (4) led to a fundamental error in its appreciation of the issues it had to consider before granting planning permission.

65. I should make it clear that I am far from saying there were not at least two views which might be taken as to the planning merits of the proposed development. The CPA was entitled to take the view that the benefits of the development outweighed the harm, even in environmental terms. But it never said that. Nor was it entitled to reach any final decision on that issue, once the duty to seek approval arose under section 41(4).

66. The CPA was entitled to take the view that the continuing collapse and degradation of the existing development could not be allowed to continue and that the proposal was better than leaving the existing development to collapse further. But those are all questions of planning merits. Consideration of those merits should not have and did not justify ignoring the statutory scheme and the duties imposed on the CPA under that scheme.

67. That the NCC may, in the circumstances identified in subsection (5), have the final word does not mean that there is no room for discussion and disagreement between the NCC and CPA. But the time for that discussion is at the stage when consultation takes place under section 41(3) or

approval is sought under section 41(4). It was at that stage the CPA might have sought to persuade the NCC either that there was no risk, or that even if there was it might be alleviated by conditions, in the circumstances that there was already existing development and that the CPA took the view that doing nothing might have a more deleterious effect on the environment. I mention these points not to take any view about the planning merits, or as to whether other factors might arise in the future, but only to emphasise that even though in cases where sections 41(4) and (5)(b) apply the NCC has the last word, that should not exclude full discussion as to a difference of views before that point is reached. One of the problems arising from the premature section 41(5)(b) notice is that the CPA might well have felt that there was no room for seeking to express its views to the NCC and for persuading it to change a mind that might well have appeared to have already been made up.

68. The moral of this appeal is that the CPA must follow the route prescribed by section 41(3) and the Guidance issued by the NCC. It must consider whether any permission it proposes to grant would or was likely to have an adverse effect, excluding from consideration the question whether conditions might ameliorate or eliminate the risk. It must set out its reasons for its answer to that question. Once it has reached its conclusion the question whether the duty to seek approval under section 41(4) will become obvious. If it considers that harm can be reduced or eliminated by conditions, it may propose them to the NCC and argue for its conclusion, recognising that the final decision as the efficacy of such conditions is for the NCC. If it considers that, given adequate conditions, the benefits of the development will outweigh the harm, then, again it can and should argue the case with NCC.

69. But I repeat, for the reasons I have given, in particular the proper construction of section 41(4) and the failure to consider that provision, I would dismiss this appeal.

Delegation to the Director

70. Although it has no relevance in this appeal, the parties asked us to rule on the contention advanced by the CPA that the NCC had no power to delegate to the Director the obligation to give a direction under section 41(5)(b).

71. This submission derives from the exclusion contained in section 3 (13) of the NCA. This section provides:

> "the Council may delegate any of its functions, *other than the making of orders and issuing of directives*, to the Director or to any committee or sub-committee of its members." (my emphasis).

72. The CPA submits that where the NCC exercises a power of compulsion it is plainly making an order and such a power is not delegable. In different statutory contexts that is correct. Sir Jeffrey relied on *Benson v Benson* [1941] P 90 in which the direction of the Board of Control under the Mental Treatment Act 1930 was construed as an order within the meaning of the Matrimonial Causes Act 1937. Similarly, in *Gebhardt v Saunders* [*1892*] 2 QB 452 a notice to abate a nuisance subject to a penalty for disobedience, was construed as an order so that the expenses in complying with a notice from the sanitary authority were covered. Thus, in many contexts an 'order' means no more than a requirement that something must be done.

73. However, in the context of the NCA I do not accept that the references to the "making of orders or the issuing of directives" can be so construed. Section 3(12) confers power on the NCC to make orders and issue directives, which may include those matters identified between (a)-(j). It is plain that the reference in section 3(13) is a reference back to the subsection which immediately precedes it. Directives are referred to in the definition section 2 of the NCA. Section 11(1) provides that a management plan may contain directives, and section 11(3) identifies particular regulation or prohibition which such directives may contain. Section 13(2) (b) refers to agreements made under section 13(1) as to conservation areas. Such agreements may refer to directives made by the NCC.

74. Schedule 1 of the NCA identifies protected species. By section 16(1) the NCC may make an order modifying the Schedule. Section 30 confers power on the Director to make a cease and desist order. This is quite different from a direction given under section 41(5)(b).

75. Section 2 defines "Law". Under section 2:

> "Law" includes any regulation, directive, direction and management plan given made or adopted under this Law".

76. By section 31(i):

> "Any person who contravenes this Law commits an offence "

77. An entity is a person (see section 2). It can hardly be supposed that it was intended that where an entity fails to comply with the NCC's direction under section 41(5) it commits a criminal offence. In summary, a direction under section 41(5)(b) is not an 'order' or 'directive' for the purposes of section 3(13).

78. Sir Jeffrey advanced a sophisticated argument under the Public Authorities Act (2020 Revision), submitting that the power to delegate had been removed.

79. He contended that the NCC was a statutory authority because it was "capable of being funded by the Cabinet" (section 2). Section 9(6) prohibits civil servants from voting in or chairing a statutory authority. If the duty to issue a direction under section 41(5)(b) could be delegated to the Director she would, in effect, be exercising a function of the NCC single-handedly as if she were the only voting member.

80. By section 3, the Public Authorities Act ("the PAA") shall prevail in the event of inconsistency between its provisions and any other Act.

81. I am prepared to assume, without deciding, that the NCC was a statutory authority. But in my view the plain words in section 3 (13) of the NCA are not to be repealed by implication. The highest the argument goes is to seek to create an inference from the provisions of section 9(6) that section 3(13) has been repealed. But it would require clear words to repeal that subsection and no such repeal has been expressed in the PAA or in any other statute. In my view, directions under section 41(5)(b) may lawfully be delegated to the Director.

82. The judge referred to inadequately drafted delegation in the past [117] but that has now been cured by a general delegation on 21 July 2021. I would rule that the NCC has power to delegate the power and duty to which section 41(5) refers and that it has validly exercised that power by its decision of 21 July 2021.

83. For all these reasons I would dismiss the appeal and order that the decision of the CPA be quashed and the matter be referred back to the CPA for fresh consideration in accordance with this judgment.

The Hon Sir Michael Birt, Justice of Appeal

84. I agree.

The Hon. Sir Richard Field, Justice of Appeal

85. I also agree.

Annex 1

General Obligations

41. (1) Subject to subsections (2), (3) and (4), every entity shall comply with the provisions of this Law and shall ensure that its decisions, actions and undertakings are consistent with and do not jeopardise the protection and conservation of a protected area or any protected species or its critical habitat as established pursuant to this Law.

(2) For the purposes of subsection (1) the Council shall formulate and issue guidance notes to entities on their duties under this Law, and any action taken in full accordance with such guidance shall be deemed to be in compliance with this Law.

(3) Every entity shall, in accordance with any guidance notes issued by the Council, consult with the Council and take into account any views of the Council before taking any action including the grant of any permit or licence and the making of any decision or the giving of any undertaking or approval that would or would be likely to have an adverse effect on the environment generally or on any natural resource.

(4) Every entity, except Cabinet, in accordance with any guidance notes issued by the Council and regulations made under this Law, shall apply for and obtain the approval of the Council before taking any action including the grant of any permit or licence and the making of any decision or the giving of any undertaking or approval that would or would be likely to have an adverse effect, General obligations The National Conservation Law, 2013 47 whether directly or indirectly, on a protected area or on the critical habitat of a protected species.

(5) In the case of a proposed action to which subsection (4) applies, the Council may, having regard to all the material considerations in this Law and regulations made under this Law -

(a) agree to the proposed action subject to such conditions as it considers reasonable, in which case the originating authority shall ensure that the proposed action is made subject to such conditions; or

(b) if the Council considers that the adverse impact of the proposed action cannot be satisfactorily mitigated by conditions, the Council shall so direct the originating authority and that authority shall refuse to agree to or refuse to proceed with the proposed action.

(6) Any person aggrieved by a decision of the Council under this section may appeal against it to the Cabinet in accordance with section 39.