

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018: No. 249

BETWEEN:

BERMUDA ENVIRONMENTAL SUSTAINABILITY TASKFORCE
Applicant

-and-

THE MINISTER OF PUBLIC WORKS
Respondent

-and-

RUDOLPH HOLLIS
1st Interested Party

-and-

THE BERMUDA NATIONAL TRUST
2nd Interested Party

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Ben Adamson, Conyers Dill & Pearman Limited, for the Applicant**
Mr Charles Richardson, Compass Law Chambers, for the Respondent
Mr Alan Dunch, MJM Limited, for the 2nd Interested Party

Date/s of Hearing: **5 February 2019**

Date of Judgment: **21 February 2019**

JUDGMENT

Applicability of Planning and Development Act 1974 in relation to development in lands designated by the Bermuda National Parks Act 1986; concept of material change of use; effect of assumed error of law on part of the decision-maker.

Introduction

1. These judicial review proceedings concern a proposal by Mr Rudolph Hollis, the 1st Interested Party (“Mr Hollis”) to operate a business within the Railway Trail Park, Fort Scaur and Hog Bay Park utilising All-Terrain Vehicles (ATVs) capable of travelling at 10 miles per hour, with each tour lasting 3 hours and consisting of two trained guides and six tourists. On 16 March 2018 the Minister of Public Works (in his capacity as the Minister responsible for Parks), the Respondent (“the Minister” or “the Respondent”) made a Ministerial Statement announcing that *“I am granting approval for a “Licence to Use Vehicles on Government of Bermuda Property” for a trial period of one year”* to Mr Hollis in relation to his proposal.
2. These proceedings were commenced by the Bermuda Environmental Sustainability Taskforce (also known as BEST), the Applicant, by Originating Motion dated 18 August 2018 seeking an order that the decision of the Minister granting approval for a licence to Mr Hollis be quashed. Mr Hollis was not represented at the hearing although his son attended the hearing as an observer. The Bermuda National Trust appeared as the 2nd Interested Party and broadly supported the position taken by the Applicant.
3. In brief, the Minister’s decision is challenged, as argued at the hearing, on three grounds. First, it is said that the Minister made his decision based upon an erroneous assumption of law in that the decision is based on the assumption that the proposal forwarded by Mr Hollis does not require planning permission under the Development and Planning Act 1974 (“the DPA”). Second, it is said by the Applicant that the approval, as given on 16 March 2018, was unlawful in that on that date Mr Hollis’ proposal would infringe the provisions of the Motor Car Act 1951 (“the MCA”) and the Road Traffic (Western Section Of The Railway Path)

Order 1955 (“ the 1955 Order”). Third, it is said that the Minister failed to give any reasons or explanation as to why he disagreed with the clear and strong recommendation by the Technical Officers that the proposal should not be approved and the failure to do so indicates that there are no good reasons.

Factual Background

4. Section 3(1) of the Bermuda National Parks Act 1986 (“the BNPA”) establishes the Bermuda National Parks System which comprises such areas of land or water as specified in the First or Second Schedule as protected areas. Railway Trail Park in all Parishes (B60-01 – B60-12) is listed in the First Schedule as Amenity Parks.
5. Section 9 of the BNPA establishes the National Parks Commission (“the Commission”) which has, as one of its functions, the making of recommendations to the Minister regarding any matter affecting protected areas within the scope of its functions, including recommendations or amendments to the First Schedule.
6. Mr Hollis’ proposal for ATV tours was first considered by the Commission on 15 September 2015 where Mr Hollis made a PowerPoint presentation of his tourism initiative. Following the presentation, the Commission discussed the environmental and other challenges which may accompany the proposed tours. Following the presentation, the Commission voted 4:3 in favour of granting Mr Hollis permission to operate at the ATV tours along the proposed areas subject to a number of conditions including:
 1. That permission was granted for a one year trial;
 2. Operation of the ATVs would be restricted to paved surfaces only;
 3. Permission was not granted for the ATVs to operate within the walking trails of Fort Scaur and Hog Bay Parks where the tours were instead to be conducted on foot;
 4. Permission was not granted for ATVs to traverse the steps along the railway trail south of Somerset Bridge; and
 5. The ATVs must not interfere with, or cause nuisance to, the public’s right of access to, and recreational use of the areas in question.

7. Mr Hollis made a further presentation to the then Minister of Environment, the Hon. Sylvan Richards, Jr on 5 April 2017. By letter dated 6 April 2017, the Minister, exercising his discretion under the BNPA, granted permission to Mr Hollis to operate the proposed ATV tours subject to the Minister's own conditions which were:
 1. Permission was granted for two years, subject to renewal;
 2. The ATV operations were restricted to the Western section of the Railway Trail Park;
 3. The ATV operations were restricted to entering and exiting Fort Scaur from and to the Railway Trail by way of service road on the south east;
 4. The ATV operations were restricted to entering and exiting Hog Bay Park from and to the public road, using the service road on the south-east;
 5. No permission was granted for the ATV operations within any of the walking trails of Fort Scaur and Hog Bay, unless specified in the approval; and
 6. All of the conditions stipulated in the 8 October 2015 letter from the Department of Parks.
8. On 28 June 2017, the Acting Director of Parks advised Mr Hollis that a signed licence was required and that no operations should be commenced until a written licence has been given by the Department. Between 20th June and 18 July 2017, there was some further correspondence between the Acting Director and Mr Hollis concerning the need for a licence and the timing involved.
9. At its meeting on 26 September 2017, the Commission enquired into the status of this proposal and the Technical Officers informed the Commission that the Park Planning Section and Park Ranger Service had written to the new Minister to review the decision of the former Minister of Environment on ATVs, as the approval posed multiple operational issues for the Department. The Commission expressed its dissatisfaction that the Minister had approved the operation of ATVs within the Park System and thanked the Technical Officers for bringing the matter for the attention of the new Minister.

10. Between 17 August and 7 September 2017, the Department prepared and circulated a Ministerial Approval Form setting out its concerns and considerations which the Department recommended the new Minister review and consider prior to determining whether to uphold the previously granted approval of 6 April 2017 by the previous Minister (Mr Richards). Included in these recommendations were the need to conduct public consultation, the need to address the 1955 Order, the need to clarify Mr Hollis' insurance coverage, times of operation, the applicable speed limits, and vehicle registration with TCD under the MCA.

11. At the direction of the Minister, the Department hosted a public consultation between 30 October and 13 November 2017, to collect feedback on the proposal. The consultation resulted in 636 submissions of which 634 objected and two were in support. Of the 634 objection, 134 indicated that they were in the Somerset/Sandys area.

12. Following the public consultation the Acting Director, Department of Parks prepared a memorandum setting out three options which the Minister could take in relation to the proposal by Mr Hollis.

13. The first option was to confirm the approval previously given by the previous Minister, Mr Richards. The Technical Officers noted that this option was subject to a number of risks. First, there were the legal, social and political risks arising out of the requirement of the BNPA. Section 15 (4) of the BNPA provided that the Minister may grant a written permit authorising any activity which was otherwise prohibited where such an activity is in the overriding public interest. Here, the Technical Officers noted, only 0.3% of those who provided feedback supported this proposal. Second, there were legal risks associated with the MCA. Technical staff at the TCD had confirmed that these vehicles did not meet the current requirements to operate on the roads. Additionally, the western section of the Railway Trail was considered a public highway and without amendment to the MCA, the operation of the ATVs along the Bermuda Railway Trail Park and other public highways was illegal. The Technical Officers pointed out that the amendments to the MCA would be required in order to operate the ATVs on the

roads. Third, there were the legal risks associated with the 1955 Order which established that the Bermuda Railway Trail Park is a highway and placed restrictions on the types of vehicles that may traverse it. ATVs were not permitted to operate along the Bermuda Railway Trail Park. An amendment to the 1955 Order would be required to allow ATVs to operate on this section of the Railway Trail. Fourth, there was the environmental risk and without an environmental impact assessment for this proposal, the Department could not predict the damage these vehicles may cause protected areas within which they operate.

14. The second option was to confirm approval to operate with additional conditions. Additional conditions could include those recommended by the Technical Officers in the Department of Parks and the Commission while mitigating the risks associated with option one.
15. The third option was to revoke the approval altogether and avoid any legal risks associated with this proposal.
16. Taking into consideration the political, legal, social and environmental risks involved when rendering a decision on the ATV proposal, the Technical Officers recommended option three: that the Minister revoke the approval to operate. The Technical Officers gave three reasons for recommending that the Minister revoke the approval. First, the proposal was not in compliance with the BNPA, the MCA and the 1955 Order. Second, an environmental impact assessment had not been conducted, meaning that the Department could not predict the impact on the protected areas within which these ATV tours would operate, and therefore could not mitigate against the potential damage in any constructive way during the licensing process. Third, the public had overwhelmingly opposed the proposal during the public consultation process.
17. On 16 March 2018, the Minister issued a statement announcing the grant of the approval for a trial period of one year. The Minister preceded this announcement with a statement that due diligence had been done and that relevant facts were considered. The Minister spoke of consultations done with the general public and

the results of those consultations, with the two largest areas of objection being danger/traffic congestion/safety and environmental impact. The Minister stated that the proposal entails cultural tours led by qualified guides, tours involving 6-8 customers and 2 guides, and that the vehicles will not traverse virgin land but only paved parts of the Railway Trail and service roads, and the operating hours are limited to 10 AM to 4 PM, Monday to Friday which will not impinge on any users of the Trail. The Minister indicated that the tour had received the necessary approvals and had the necessary insurance coverage and a first aid certification.

Challenge based on the lack of planning permission under the DPA

18. The primary legislation dealing with the control of development of land in Bermuda is the DPA. The Applicant contends that the use of the Railway Trails by the ATVs amounts to a material change of their use such that planning permission is required from the Development Applications Board (“the DAB”). The Applicant argues that the only statutory body with the ability to change the use of land is the DAB, acting in accordance with the terms of the DPA, and the Minister was required to obtain the necessary planning permission from the DAB before he could properly give approval to the proposal made by Mr Hollis. An application for the change of use to the DAB would ensure that it is properly considered, objections can be taken into account and the Technical Officers can ensure that proper environmental studies are performed.
19. The Minister appears to have proceeded on the premise that, if the proposal complied with the BNPA, then planning issues did not arise. Throughout the consideration of the proposal made by Mr Hollis, it appears that no one raised the issue whether this application needed planning permission from the DBA and that included the Technical Officers and the Ministers.
20. In considering whether planning permission is required under the DPA in relation to this proposal, one has to look at the main provision of the DPA dealing with the circumstances where planning permission is required.

21. The main provision dealing with development requiring planning is section 14 of the DPA which provides:
- (1) *Subject to this Act, planning permission is required for any development of land that is carried out on or after 3 August 1965.*
 - (2) *In this Act, except where the context otherwise requires, “development” means the carrying out of building, engineering or other operations in, on, over or under any land, the making of any material change in the use of any building or other land or the demolition or the making of a material alteration to the external appearance of a listed building, except that the following operations or uses of land shall not be deemed for the purposes of this Act to involve development of the land—....(b) the carrying out by a highway authority of any works required for the maintenance or improvement or widening of a road; (emphasis added)*
22. The expression “road” is further defined in section 1, dealing with interpretation, as *“any road whether public or private and includes any street, square, court, alley, lane, bridge, footway, track, path, passage, or other highway, whether a thoroughfare or not”*
23. The Applicant contends that a road or a trail is of course land and planning permission is required for any development on such a road, a fact made clear by section 14(2)(b) where express exception is made for widening of the roads by the authorities. The Applicant also points to section 32 which confirms that planning permission is required in relation to Crown land. Section 32(1) provides: *“Where application for planning permission to develop or subdivide land is made by the Government or any agency of the Crown and the Board refuses planning permission or grants such permission subject to any conditions or limitations which, in the opinion of the Minister, are inappropriate in all the circumstances of the case, the Minister may give a direction substituting his own decision for that of the Board.”*
24. In light of these statutory provisions and in the absence of any provisions to the contrary in another statute, the position would appear to be that any material

change in the use of the Railway Trail would require planning permission under section 14 of the DPA.

25. The only other statute which can have any impact on this position is the BNPA. Section 4 of the BNPA deals with the Minister's obligation to consult the public in relation to certain proposals. It provides:

"The Minister shall by notice published in the Gazette announce any proposal for (a) the construction of any road or building, the change of use or the change of boundary with respect to a protected area; (b) any amendment to the First Schedule, and shall give opportunity for and shall take into account public comments before acting on the proposal."

26. The other provision in the BNPA which may have relevance to the Minister's power to regulate is section 15 which, in material part, provides:

"(1) Any activity undertaken within a protected area shall be consistent with the purposes of the protected area and the provisions of its management plan and, where necessary, activities may be regulated or prohibited by the Minister to ensure that the objectives and purposes of the protected area and provisions of the management plan are complied with.

.....

(2) The Minister may, after consultation with the Commission, grant a written permit, on such terms and subject to such conditions as he may consider necessary, authorizing an activity which would otherwise be prohibited in that protected area where such activity is in the overriding public interest."

27. It will be seen that the BNPA is not dealing with the subject matter of planning permission in relation to land and buildings which are designated pursuant to the BNPA. This much appears to be accepted on behalf of the Minister. In the written submissions submitted on behalf of the Minister the position was clarified along the lines that "... whilst on a literal reading of the DPA 1974 it would appear that the trails are land which is subject to the control of the Planning Department.

However, in reality, Planning does not entertain applications for activities, developments etc with regard to “protected” land. These applications are directed to the Minister who has control over the respective land in question- a process which can be legislatively seen in section 7 of the BNPA 1986.”

28. In argument, counsel for the Minister clarified the legal position and contended that all planning issues in relation to the Railway Trail and other park land were under the jurisdiction of the Minister responsible for the Parks and not under the DPA. The argument advanced on behalf of the Minister is that the DPA, and in particular section 14(1) of the DPA, has been impliedly repealed by the BNPA as far as the lands designated pursuant to and regulated by the BNPA are concerned. This is a far reaching submission which requires careful consideration. For the reasons set out below I am unable to accept this submission.
29. First, the principle relating to implied repeal of an earlier statute is a narrow one. In *Bennion on Statutory Interpretation*, 5th edition, the principle, at page 304, is explained as follows: “*If a later Act makes contrary provision to an earlier, Parliament (though it has not expressly said so) is taken to intend the earlier is repealed. The same applies where a statutory provision contrary to a common law rule. “The test of whether there has been a repeal is this: are the provisions of the later Act so inconsistent with, repugnant to, the provisions of an earlier Act that the two cannot stand together”*”.
30. On the face of the material provisions of the DPA and the BNPA there is, in my judgment, no such inconsistency. As was pointed out by counsel for the Applicant and the 2nd Interested Party, the provisions in the BNPA are in addition to the requirements of the DPA and not in contradiction with them. The statutory scheme in relation to a change of use of the protected areas requires public consultation under section 4 of the BNPA and if the Minister wishes to proceed with the proposal following the public consultation, then the Minister has to obtain the necessary planning permission under the DPA. The BNPA provides additional consultation and protection in relation to the protected areas covered by

the BNPA and does not replace the statutory scheme relating to control of the development of land set out in Part IV of the DPA.

31. The issue whether a later Act has repealed provisions of an earlier Act is strictly to be determined by reference to the construction of the two statutes. In particular the issue of implied repeal cannot be determined by reference to how a particular statutory body has administered the Act which is said to have been repealed. The principle of implied repeal requires us to look at the inconsistency between statutory provisions, as properly construed, and not at any potential inconsistency of approach adopted by the statutory bodies charged with administering the earlier Act.

32. Second, counsel for the Minister submitted that it was the practice of the Planning Department to only consider development application in relation to buildings on the land which were administered under the BNPA and not in relation to the change of use in relation to the land itself. Counsel argued that the Planning Department would consider a planning application in relation to a building in protected areas but would not consider an application for change of use in relation to Railway Trails and, in relation to the latter, would simply refer that application back to the Minister responsible for the Parks. Such an argument, made on behalf of the Minister, would appear to provide a complete answer to the suggestion that the DPA has been repealed as far as any development over the lands designated pursuant to the BNPA. Once it is accepted that the Planning Department does have jurisdiction in relation to planning applications for buildings in protected areas it necessarily follows that there has been no implied repeal of the DPA by the BNPA. There can be no principled basis for suggesting that the DPA has been impliedly repealed in relation to any development (including change of use) on the Railway Trail but the DPA has not been impliedly repealed in relation to the development comprising construction of buildings in the protected areas or indeed on the Railway Trail.

33. Third, as noted earlier, the DPA expressly extends the Planning Department's jurisdiction in relation to any development on the "roads" (as that term is defined

in the DPA) and in relation to Crown lands. Railway Trails would appear to be expressly included in these provisions.

34. Fourth, Bermuda Plan 2008 (referred to in paragraph 27 of the affidavit of Dorcas Roberts), the current development plan, as required by Part III of the DPA and as approved by the Bermuda legislature, confirms that the DAB indeed exercises jurisdiction in relation to lands designated pursuant to the BNPA and in relation to all matters mandated under the DPA. Lands designated pursuant to the BNPA are subject to the planning requirements set out in Chapter 15 of the 2008 Plan.

Chapter 15 provides:

“Chapter 15: Park (PAR)

Introduction

The Park zone includes lands designated pursuant to the Bermuda National Parks Act 1986 (as amended) and are regulated by the provisions of that Act. As such, the National Parks Commission shall be consulted on any proposal located on lands protected by the Bermuda National Parks Act 1986 (as amended).

The Park zone also includes other public amenity open spaces not designated under the Bermuda National Parks Act 1986 (as amended). These areas shall be protected as amenity parks for the use and enjoyment of the general public.

Objective

PAR (1) To protect sufficient land as amenity parkland for the passive and active recreational enjoyment of the public

General direction to the Board

PAR.1 The Board shall apply the Park zone policies and other relevant policies of the Statement in a manner best calculated to achieve objective PAR (1).

PAR.2 The Board shall request comments and advice from the National Parks Commission regarding any development proposed within a Park protected under the Bermuda National Parks Act 1986 (as amended) in accordance with policy DAB.10.

Conservation Management Plan

PAR.3 The Board may require the submission of a Conservation Management Plan for any development proposal in a Park zone in accordance with policies ENV.7 and ENV.8.

Development restrictions

PAR.4 (1) No development shall be permitted which is incompatible with the quality, character and function of the park.

(2) Siteworks and accessory structures may be permitted, but only if the Board is satisfied that:

(a) the proposal is essential to the maintenance, conservation, enhancement or enjoyment of the park; (b) there will be no adverse impact on any feature of special environmental value or scientific interest; (c) the proposal is not detrimental to the natural or visual quality of the area by reason of its location, size, design or appearance; (d) natural materials are used in the design of any siteworks and structures as far as is possible; and (e) in the case of a Park protected under the Bermuda National Parks Act 1986 (as amended), the National Parks Commission does not object to the proposal.

(3) Agricultural uses may be permitted in those areas of a Park zone which are also located within an Agricultural Reserve Conservation Area in accordance with the policies of Chapter 20, Agricultural Reserve.

Setback of development

PAR.5 Any development proposed in a zone adjacent to a Park zone shall have a minimum setback distance of 15 feet from the boundary of the Park zone in accordance with policy APC.18.

Subdivision

PAR.6 The subdivision of land within a Park zone may be permitted at the discretion of the Board but only if the Board is satisfied that the proposal complies with policies SDV.11 and SDV.14.

35. The draft Bermuda Plan 2018 treats lands designated pursuant to and regulated by the BNPA in materially identical terms at Chapter 16.
36. In the circumstances, I am unable to accept the submission made on behalf of the Minister that the planning provisions contained in the DPA do not apply to lands designated and regulated by the BNPA. In particular I do not accept the submission that the BNPA has impliedly repealed the provisions requiring planning permission for development on land in the DPA so far as lands regulated by the BNPA are concerned. In my judgment Part IV of the DPA, dealing with control of development of land, applies with full force to any development proposed on lands designated pursuant to and regulated by the BNPA.
37. I should also add that, in my judgment, the power given to the Minister under section 15(4) of the BNPA does not extend to overriding the requirements of section 14 of the DPA. Whatever the precise scope of section 15(4) of the BNPA it cannot extend to the exercise of statutory power or function given to another statutory body under a different statute. The legal authority to give planning permission, where planning permission is required, can only be exercised by the DAB in accordance with the provisions of the DPA. Section 15(4) of the BNPA cannot properly be construed as overriding the functions and powers of the DAB in this regard.

38. Furthermore, the power under section 15(4) can only be exercised by the Minister “*after consultation with the Commission*”. Here, as noted at paragraph 9 above, the Commission, at its meeting on 26 September 2017, had expressed its dissatisfaction that the previous Minister had approved Mr Hollis’ proposal. There is no suggestion that the current Minister consulted the Commission, after the Commission’s meeting on 26 September 2017, in relation to this proposal. In the circumstances, I am satisfied that the decision of the Minister communicated on 16 March 2018 could not override the potential requirement of planning permission in relation to this proposal.
39. The remaining question in relation to the application of the DPA is whether this particular proposal by Mr Hollis required planning permission under section 14 of the DPA. The answer to this question depends upon whether the proposal involves any material change in the use of any lands or building designated and regulated by the BNPA.
40. The issue whether a particular proposal involves a material change in the use of any building or of other land is essentially a question fact and an issue which has to be decided by the DAB. In considering whether there has been a material change of use, “*what is really to be considered is the character of the use of land, not the particular purpose of a particular occupier*” (*East Barnet Urban District Council v British Transport Commission* [1962] 2 QB 484, 491).
41. In considering whether Mr Hollis’ proposal involves a material change in the use of land, the Court is entitled to look at how the Technical Officers and the Minister himself viewed this issue. In this connection section 4 of the BNPA, as previously noted, requires the Minister to undertake public consultation where a particular proposal involves “the change of use” with respect to the protected area. Section 4 expressly refers to “*change of use*” and provides:

“(1) *The Minister shall by notice published in the Gazette announce any proposal*
for—

(a) *the construction of any road or building, the change of use or the change of boundary with respect to a protected area;*
(b) *any amendment to the First Schedule, and shall give opportunity for and shall take into account public comments before acting on the proposal”* (emphasis added).

42. In the Appendix to the Ministerial Approval Form the Technical Officers noted that, *“The granting of permission to use ATVs within the Bermuda Railway Trail, Fort Scaur Park, and Hogg Bay Park constitutes a change of use of these protected areas. The Minister had not sought or taken into consideration public comments on the proposal before granting permission. Section 4 of the Act has not been satisfied”* (emphasis in the original).

43. After the Minister had decided to support Mr Hollis’ proposal Terry Lynn Thompson, one of the Technical Officers, advised the team that: *“The Minister is in support of the proposal referenced above. At this time the responsibility of the Department of Parks is to progress this proposal and I request that you conduct the following tasks; (1) take the necessary steps to publish in the Gazette the change of use of the Bermuda Railway Trail in the affected areas. Please...provide the reason for the proposed change ...”* (emphasis added).

44. The publication seeking public feedback was headed “Proposed Change of Use to the Bermuda Railway Trail Park, Scaur Hill Fort Park and Hog Bay Park”. The publication advised the public:

“As required under section 4 of the Bermuda National Parks Act 1986, the Ministry of Public Works, is giving Notice to the general public of the proposed All-Terrain Vehicle (ATV) Tour to operate on the western section of the Railway from Beacon Hill Road to Morgan’s Point, Sandys. The Ministry would like to solicit comments on the proposed change of use of the protected area...” (emphasis added).

45. It is said on behalf of the Minister that section 4 of the BNPA requires public consultation when there is a “*change of use*” of protected land whilst the DPA

only requires planning permission where there is a “*material change in the use*” of land and the difference in terminology demonstrates that a change of use and a material change of use cannot be synonymous. For present purposes I am unable to accept this submission. It is difficult to see a situation where the Minister would be required to seek public consultation in relation to a “*change of use*” unless that change of use was relevant and material. For the purposes of this application, there is no relevant difference between the expression “*change of use*” used in section 4 of the BNPA and the expression “*material change in the use*” in section 14 of the DPA.

46. Counsel for the Minister further argues that the proposal made by Mr Hollis is not a “*material change of use*” from that currently permitted, allowed, and regularly takes place on the Railway Trail in question. Again, I am unable to accept this submission. It has to be remembered that the lawful use of the Railway Trail is regulated by legislation in the form of the 1955 Order, which in part, provides:

“Restrictions on type of vehicle

3(1) Subject to article 4

(a) no vehicle other than a pedal bicycle, a tricycle or other vehicle which is not motor propelled shall be used or driven on those parts of the railway path lying between Franks Bay in Southampton Parish and George's Bay Road in Southampton Parish which have been declared to constitute highways; or

(b) no vehicle other than a cycle, an auxiliary bicycle or a horse drawn vehicle shall be used or driven on those parts of the railway path beginning at George's Bay Road in Southampton Parish and ending at the former railway terminal at Somerset in Sandys Parish which have been declared to constitute highways

...

(2) Nothing in paragraph (1) of this article shall have effect so as to restrict the driving of vehicles on any right of way across the Western section of the railway path for the purpose of going to or from any property.”

47. The Order therefore makes it clear that motor cars are not permitted on any part of the Railway Trail, even highways. It also makes it clear that the Railway Trail is not itself a highway (for its entire length) and thus a place where motor cars can normally be driven. The only exception to these restrictions is on any right of way for the purpose of going to or from any property. Indeed the Technical Officers advised the Permanent Secretary that the present use permitted on the Railway Trail would not allow the ATVs to operate on this section of the Railway Trail. The Technical Officers advised:

“The Road Traffic Order 1955 establishes that the Bermuda Railway Trail Park is a highway and places restrictions on the types of vehicles that may traverse it. ATVs are not currently permitted to operate along the Bermuda Railway Trail Park. This would require amendment to the Order or the discretion of the Minister of Public Works and the Minister of Transport and Regulatory Affairs to allow the ATVs to operate on this section of the Railway Trail”

48. Given that ATVs are currently prohibited from operating along the Bermuda Railway Trail and to allow them to use the Railway Trail requires amending legislation is a strong indicator that to operate ATVs on the Railway Trail would indeed amount to a *“material change of use”* of the Railway Trail. As indicated earlier the issue whether operation of ATVs on the Railway Trail amounts to a *“material change of use”* is ultimately a question for the DAB. Case authorities indicate that as a matter of principle, this Court should only be concerned with whether a particular proposal *“could”* amount to a *“material change of use”* and that threshold is sufficient for the purposes of requiring an application to be made for the necessary planning permission. Clearly this proposal meets that threshold. I would add that if it was necessary for the Court to decide whether this proposal amounts to a *“material change of use”*, for the purposes of the DAP, I would answer that question in the affirmative.

49. I also agree with counsel for the Applicant that the use of the bus depot as a livery for the ATVs is likely to involve a “*material change of use*” and is likely to require planning permission. As a bus depot the building was likely to have been classified as a “shop,” within the meaning of that term in the Development and Planning (Use Classes) Order 1975, and that classification would not have allowed the bus depot to be used as a livery. Further, planning permission is likely to be required in any event as the bus depot has not been used as such for the last three years. In the circumstances it would have been necessary to apply for planning permission for the proposed use of the bus depot in relation to this proposal.

50. The Minister, in granting the approval for the ATVs proposal by Mr Hollis, assumed that planning permission was not required in relation to this proposal. In my judgment that was an erroneous assumption and amounted to an error of law. The Minister, as the decision-maker, is required to properly address himself in relation to relevant legal issues and failure to do so will result in the decision made being set aside on an application for judicial review (*Reg. v Barnet L.B.C., Ex p. Shah* [1983] 2 AC 309). Having regard to these well established principles and having regard to the circumstances outlined above, I confirm that the Minister’s decision announced on 16 March 2018 in relation to Mr Hollis’ proposal to operate ATV tours is hereby quashed.

Challenge based upon illegality

51. As noted above at paragraph 13, the Technical Officers had advised the Minister that ATVs could not operate on the Railway Trail for a number of reasons given the requirements of the MCA and the prohibition appearing in the 1955 Order. Indeed it would have been unlawful to attempt to operate the ATVs at that time. When the Minister announced the approval for a licence to use the ATVs on 16 March 2018, the legal position identified by the Technical Officers had not changed. The applicant contends that in those circumstances the Minister could not validly approve the licence until all the legislative amendments to regularise the position had taken place.

52. I agree that if the licence had been granted on 16 March 2018 that decision would clearly be liable to be set aside on ground of illegality. However, despite the unconditional nature of the statement made by the Minister to Parliament, the decision to grant the licence was in substance conditional or provisional.

53. One starts with the memorandum prepared by the Acting Director of the Department of Parks to the Permanent Secretary setting out the three options which the Minister could consider. The first option was to confirm previous Minister's approval to operate and if the Minister elected that option, the memorandum pointed out that to operate the ATVs would be in breach of the MCA and the 1955 Order. However, the memorandum did not assert that the Minister could not elect that option. Indeed the memorandum goes on to explain that if the Minister did elect that option then steps would have to be taken to regularise the position. The memorandum states:

“Should the Minister choose to confirm the approval of the proposal to operate, the next steps would be to: In consultation with the Attorney General's Chambers, address the various legal and environmental risks identified above. If the identified risks have been mitigated, forward the draft licence to operate on to the applicant for review and signature...”
(emphasis added).

54. As noted, the Minister made the announcement approving the proposal on 16 March 2018 but did not in fact issue a licence to Mr Hollis so that he can operate the ATVs. Soon thereafter legislation was introduced to amend the MCA so as to allow ATVs to operate lawfully. The MCA has been amended by the Motor Car Amendment (No. 2) (Tour Quadricycles) Act 2018 allowing ATVs to operate without infringing the MCA. The Minister intends to cause the 1955 Order to be amended so that the ATVs can operate in accordance Mr Hollis' proposal. The Minister has advised that the licence will only be issued to Mr Hollis after all the legislative amendments have been made so that Mr Hollis may operate the ATVs.

55. In the circumstances I am satisfied that the proposal, if implemented, as set out in the previous paragraph, will not entail illegality. I accept that to grant approval in these circumstances and on a provisional basis may seem unusual but I do not consider that such a decision can be categorised as irrational. Accordingly, I would not have set aside the decision on this ground.

Failure to give reasons

56. The Applicant contends that the Minister has not put forward any reasons for disagreeing with his own technical advice, whether in whole or in part. It is said that in those circumstances it is impossible to infer that the Minister had good reason for rejecting the advice. The Applicant asks the Court to conclude that the decision of the Minister is unlawful for failing to take into account material factors, namely those factors set out in the technical advice.

57. The Applicant relies upon *Reg. v Secretary of State for Trade and Industry Ex parte Lonrho PLC* [1989] 1 WLR 525, where the House of Lords stated that the absence of reasons for a decision, where there is no duty to give them, cannot of itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has not given any reasons, cannot complain if the court draws the inference that he had no rational reason for his decision.

58. In considering this submission the starting point again is the memorandum prepared by the Acting Director setting out three options which the Minister could consider. Whilst the memorandum contained a recommendation by the Technical Officers, the memorandum did not state that the Minister could not validly select one of the other options. Indeed, the memorandum set out the steps which had to be taken if the Minister did not select the option Recommended by the Technical Officers.

59. The Minister is not bound to give reasons for his decision. However, his reasons for confirming the previous Minister's decision can be gleaned from the memorandum prepared by the Acting Director and the statement made by the Minister to Parliament in March 2018. The rationale would appear to be as follows:

- (1) The project is potentially beneficial to the tourist industry and as a policy matter it should be encouraged.
- (2) The legislative impediments in terms of the MCA and the 1955 Order will be rectified before any licence is given to Mr Hollis.
- (3) The public consultation was lopsided partly because many of the objections were lodged without full knowledge of operation such as that the proposal is for guided cultural tours by qualified guides; the ATVs will be travelling at a maximum of 10 mph; the operating hours will be between 10 AM to 4 PM- Monday to Friday; the ATVs will not traverse any virgin land and will only use a Railway Trail and service roads.
- (4) The initial licence will only be for 12 months and it will be on a "trial period" basis. In particular, if Mr Hollis is in breach of any of the conditions agreed upon, the licence will be revoked.

60. It is conceivable that many may disagree with the reasons given and the rationale advanced by the Minister for approving this particular proposal but it cannot reasonably be said that the Minister has not given any reasons for his decision. In the circumstances it is not appropriate to set aside the decision on the ground that the Minister has not given any reasons and that the Court may infer that the Minister did not have good reasons for his decision.

Conclusion

61. I have held that in granting the approval for this ATVs proposal, the Minister assumed that planning permission was not required. I have also held that, in my judgment, it was an erroneous assumption and amounted to an error of law. In the

circumstances, I order that the Minister's decision, announced on 16 March in relation to Mr Hollis' proposal to operate ATV tours, is hereby quashed.

62. I will hear the parties in relation to the issue of costs, if required.

Dated this 21 of February 2019

NARINDER K HARGUN
Hon. Chief Justice