

Today's Choices Tomorrow's Costs

The Ombudsman for Bermuda's Systemic Investigation
into the Process and Scope of Analysis for
Special Development Orders



February 10, 2012



February 10, 2012

The Speaker, The House of Assembly
The Hon. Stanley Lowe, OBE, JP, MP
Sessions House
21 Parliament Street
Hamilton HM 12

Dear Honourable Speaker,

I have the honour to present a Special Report of the Ombudsman for Bermuda's Systemic Investigation into the Process and Scope of Analysis for Special Development Orders.

This Report is submitted in accordance with Sections 24(2)(a) and (3) of the Ombudsman Act 2004 which provides:-

Annual and special reports

- 24(2)(a) Where any administrative action that is under investigation is in the opinion of the Ombudsman of public interest; then the Ombudsman may prepare a special report on the investigation.
- 24(3) The Ombudsman shall address and deliver his annual report and any special report made under this section to the Speaker of the House of Assembly, and send a copy of the report to the Governor and the President of the Senate.

Yours sincerely,

Arlene Brock
Ombudsman for Bermuda

EXECUTIVE SUMMARY: TODAY'S CHOICES – TOMORROW'S COSTS

Bermuda is obliged to conduct Environmental Impact Assessments (“EIA”) prior to approval in principle for development proposals that are “major” or “likely to have significant adverse effect on the environment”. This obligation is established by Bermuda’s signature in 2001 to the UK Environment Charter (with the Overseas Territories).

This obligation is not discretionary and applies whether development proposals are approved by the Development Applications Board (“DAB”) or by the Legislature as SDOs. Accordingly, it is a mistake of law not to conduct EIAs prior to approval of development proposals that are major or likely to have significant adverse effect on the environment.

An EIA is a process which analyzes the short and long term benefits and costs of proposed developments before approval is granted. One purpose of an EIA is to: identify risks; ways to mitigate risks; as well as alternatives to development proposals (such as site, design). Another purpose of an EIA is to ensure transparent public consultation, disclosure and input.

This Report applauds the 2011 amendment to the Development and Planning Act 1974 that requires SDOs to be approved by the Legislature instead of a Minister. This is an important improvement with respect to who grants approval of SDOs. However, this amendment is not a substitute for what, when and how information is gathered and analyzed.

With respect to the Tucker’s Point SDO application, this Report finds that, as there was no proper process to gather information, the data available to inform analysis and decision-making was inadequate. The failure of a proper public consultation process resulted in ad hoc, adversarial airing of public concerns. Pertinent data was sidelined because the messengers were dismissed as “tree huggers”, “the usual voices” and “alarmists”.

Accordingly, the conditions attached to the SDO were inadequate and certainly not as stringent as claimed. Indeed, five of the “conditions” indicated some of the scientific studies that are needed in order to properly evaluate the application.

The reserved matters in the Tucker’s Point SDO – to be determined by the DAB – provides no comfort that the full risks of the proposed development will be analyzed. The reserved matters deal with the kind of development that is allowed (design, engineering, landscaping, height, etc.). Information gathered at the reserved matters stage may be too late to inform the preliminary determination about whether development should take place at all. Should such information indicate that a proposal should not be approved, it would be awkward for the DAB to overturn ‘in principle’ approval already granted by the Legislature.

Today’s Choices – Tomorrow’s Costs surveys Privy Council decisions (binding on Bermuda) as well as international best practices and standards for public consultation and data gathering and analysis. An EIA – conducted in accordance with Bermuda’s legal obligations and international best practices – would:

- identify the true and domino costs of economic activities today that could adversely affect the environment for generations to come
- guard against approval of development that cannot realistically be carried out
- promote transparency and public trust
- mute suspicions that information is deliberately withheld and that the grant of SDOs benefits the interests of a few rather than Bermuda as a whole
- ultimately secure inter-generational justice through the principles and practices of sustainable development.

TABLE OF CONTENTS

SECTION 1: Introduction.....	1
SECTION 2: International Law.....	5
SECTION 3: Rio Declaration on Environment and Development.....	9
SECTION 4: Common Law.....	11
SECTION 5: Impact Assessments.....	13
SECTION 6: Public Consultation and Disclosure.....	15
SECTION 7: Development Laws and Plans.....	21
SECTION 8: Special Development Orders.....	25
SECTION 9: The Tucker’s Point Site.....	28
SECTION 10: Tucker’s Town History.....	39
SECTION 11: Tucker’s Point Special Development Order.....	45
SECTION 12: Sustainable Tourism.....	55
SECTION 13: What is Inadequate or Missing Because There Was No EIA.....	60
SECTION 14: Role of the Civil Service.....	65
SECTION 15: Conclusion.....	67
SECTION 16: Recommendations.....	69
SECTION 17: Appendices.....	73
Appendix I – Note on Ombudsman’s Jurisdiction.....	73
Appendix II – List of SDOs / Special Acts 1978 - 2011.....	76
Appendix III – Small Island Developing States Research.....	80
Appendix IV – Ramsar Listing of Wetlands in Bermuda.....	82
Appendix V – HSBC Equator Principles.....	84
Appendix VI – Excerpt from 1994 Competitiveness Commission Report.....	86
Due Process Responses.....	88

“Failure to incorporate biodiversity concerns in destination planning and investment will have detrimental effects on the natural environment, increase conflict with local communities, and lead to reduced value-creation potential for both the destination and investors.”

(Green Economy Report – Tourism Chapter – UNWTO and UNEP Oct. 2011)

1: INTRODUCTION

The 2011 Tucker's Point Special Development Order ("TP SDO") was almost the perfect storm. First, this SDO allows development in the last remaining, most pristine, biodiverse and environmentally sensitive corner of Bermuda. Second, no other hotel property has had the combination of history, significant encroachment on protected lands and concessions from successive governments (both PLP and UBP) as Tucker's Point. Third, both in 1995 and 2011, Special Development Orders ("SDOs") for Tucker's Point were granted just as the global economy was emerging from deep recessions; when the tourism industry in Bermuda seemed to be in implacable downturns; and respective governments were anxious to revitalize the industry. Finally, in 2011, in an era of Google, transparency and public access to information, there were serious questions about the adequacy of information disclosed. Unsubstantiated allegations ensued. An issue of national importance clearly warranted neutral, evidence based deliberations.

In 2009, Tucker's Point (collectively, "TP" – including predecessor and subsidiary companies) had outlined to the Government: its financial difficulties; the need to identify *"real estate development opportunities"* to improve security on its bank loans; and a willingness to donate certain lands with *"significant open space value"* to Bermuda.

In February 2010, TP presented to the Cabinet Committee on Special Hotel Development its proposal to develop approximately 23 acres of conservation protected land (largely on Quarry Hill, Paynter's Hill and two Harrington Sound sites) plus some 59 acres of Whitecrest Hill (which were already approved for development). TP offered to donate approximately 26 acres of conservation zoned land to Bermuda (including 18 acres of Mangrove Lake). In July 2010 at a meeting amongst the Government, HSBC (senior lender) and TP, the Government expressed support for the SDO on the condition that TP secure a world-class hotel management company. In October 2010, environmentalists alleged that the Government was moving forward with a SDO but the official response was that this was "purely speculative". On February 4, 2011, the TP SDO was tabled in Parliament.

In prior years, the Minister responsible for the environment had the sole discretion under s. 15(12)(a) of the Development and Planning Act 1974 ("DPA") to approve SDO applications. Accordingly, for a majority of past SDOs developers dealt directly with the Minister and / or Cabinet. Technical officers, even within the Department of Planning ("Planning"), were brought in after

SDOs were granted for the purpose of figuring out how they should be implemented – not to advise whether they should be granted. To their credit, for the TP SDO, the then Cabinet Secretary and Permanent Secretary of the Ministry of the Environment, Planning and Infrastructure Strategy ("the MEPIS") requested input from Planning (which, in turn, consulted with the Department of Conservation Services) some six months prior to grant of the TP SDO.

An amendment to the DPA of March 1, 2011 was a genuine attempt to make the SDO process more transparent. The amendment provides for the grant of SDOs by the affirmative resolution procedure of the House of Assembly and the Senate. This amendment put the fact that there is to be a decision on a SDO application squarely in the public eye. This enables scrutiny by Legislators and presumes the possibility of public lobbying. However, the amendment does not ensure adequate data collection, incorporation of technical expertise or public disclosure. The amendment does not neutralize the partisanship and political calculations that can detract from consideration of the merits.

The TP SDO was passed in the House of Assembly on March 2, 2011 by a vote of 21 to 10 and progressed to the Senate on March 18, 2011. The Senate is comprised of five members nominated by the Government, three by the Opposition and three independent members appointed by the Governor. On the occasion that the three opposition and three independent Senators vote down a Government bill, it cannot be brought for another vote for a full year – to allow the issues to be reconsidered and recrafted. At this second vote, the Senate vote cannot defeat a Government bill.

During the first Senate Debate for the TP SDO, it was unclear that the Government would prevail. Before votes were cast the Government employed a legislative device to postpone the vote by requesting that the Senate "rise and report progress". A week later, on March 25, 2011, the second Senate Debate saw a revised proposal: the most controversial site – Quarry Hill, atop several known caves – was removed. This reduced the proposed footprint on conservation lands from 23 to 12.4 acres. In addition, TP added almost 10 acres to its donation of land (notably one acre on Harrington Sound Road which was used by the public and maintained for at least three decades by the Department of Parks). The SDO was approved.

The TP SDO focused Bermuda on two central questions: (a) what constitutes the national interest; and (b) how do we assess the long-term costs of development proposals. The issue is not whether

tourism development should be encouraged. Rather, the essential controversy is whether tourism development should be allowed on land intended to be protected forever from development. The choice is how to balance two equal imperatives – the need to bolster the economy and the sagging tourism industry today with the need to conserve the physical environment for the social and economic good of current and future generations.

Almost everyone seemed to have an opinion – but very little in the way of data. There were allegations on all sides of the issue. Opponents of the TP SDO launched public protests and charged that: proposed development would destroy rare species and habitats; the SDO is a real estate deal disguised as tourism; the SDO was brought to the Legislature in the middle of the annual Budget Debate in order to limit the focus and time for fully informed debate. [The TP SDO was scheduled after the Senate’s Budget Debate ended at 5 p.m. This provided an opportune tactic for activists with signs encouraging motorists leaving work in Bermuda’s capital city to honk their horns in opposition. Thus Senators debated for hours against the background of incessant car horns.]

Voices in favour of the SDO alleged: opponents were misinformed, hostile to development and alarmist; the SDO is vital to Bermuda’s entire tourism industry; opposition would damage Bermuda’s reputation with potential foreign investors; failure to issue the SDO would imperil jobs in all sectors of the economy. [During the investigation I even heard the fear expressed by a senior civil servant that Bermuda needs to be cautious about putting any burdens on foreign investors because we are unable to compete with low cost independent Caribbean nations that could offer fishing rights and United Nations votes in exchange for investment. I was able to debunk this fear – but this did beg the question of the extent to which advice to decision-makers may be based on unsubstantiated theories.]

Similar furor had erupted in 2007 over proposals to develop the Southlands estate. In that case, although all of the lands were not

pristine, the development proposals threatened to destroy important coastline, including nesting sites of Bermuda’s iconic longtail bird. The Southlands SDO was in draft form only, and was disclosed prior to approval by the developers and the then Minister. That controversy was resolved by the diplomacy of a former Premier who helped to broker a swap of a major brownfield (already developed) site to protect the Southlands from development. The growth of a vocal environmental movement had been spurred on also by another controversy (which did not progress to a SDO) that proposed to extend the footprint of the new hospital into the park zoning of the Bermuda Botanical Gardens.

These controversies alerted Bermuda to serious deficiencies in the SDO process – particularly the vacuum in opportunities for public input. The debate swirling around the TP SDO was equally heavy with emotion and light on evidence. In 2011, it seemed as if little had been learned from 2007. Then as now, speculation and suspicion rushed in to fill gaps in information and process. It is clear that there is neither a consistent process to ensure public input nor guidance for disclosure of adequate information to evaluate SDO applications.

Whether in the legislative process, the media, public opinion or administrative actions, the question of how different national interests should be reconciled deserves the benefit of full, neutral and factual information that should be available to all stakeholders and decision-makers. When Government regulation is involved, it is the role of civil servants to corral all relevant considerations in order to advise the Minister, Cabinet and Legislature. In light of the unsubstantiated claims made about the TP SDO, I decided to investigate the scope and quality of the information analyzed and recommendations made by civil servants. Section 5(2)(b) of the Ombudsman Act 2004 (“the Act”) authorizes the Ombudsman: *“on his own motion, notwithstanding that no complaint has been made to him, where he is satisfied that there are reasonable grounds, to carry out an investigation in the public interest.”*

*“One’s philosophy is not best expressed in words;
it is expressed in the choices one makes...and the choices
we make are ultimately our responsibility.”*

(Eleanor Roosevelt)

My jurisdiction to conduct this investigation was challenged. It came to my attention that some civil servants were even instructed not to comply with my requests for interviews. I engaged an external legal opinion that confirmed: *“steps taken (such as information gathering and analysis) by departmental officers and employees or others acting on behalf of the department with a view to advising a Minister of Cabinet are not excluded from the Ombudsman’s jurisdiction”* (see Appendix I).

Our investigation entailed:

Documentary review and research: communication amongst the Departments of Planning, Conservation Services and Sustainable Development; prior SDOs; Reports – 2005 State of the Environment Report; 2010 Economic Value of Bermuda’s Coral Reefs; 1994 Competitiveness Commission Report; Histories – *Chained on the Rock* (C. O. Packwood); *The House that Jack Built* (C. V. Woolridge); *Another World: Bermuda and the Rise of Modern Tourism* (quoted by kind permission of Dr. Duncan McDowall); media reports; jurisprudence; planning laws of seven countries (Antigua & Barbuda, Bahamas, Barbados, British Virgin Islands, Curaçao, St. Lucia, Isle of Man).

Interviews:

Local: 21 civil servants; 4 TP representatives; 3 HSBC officials; 36 submissions and interviews of the public; 3 hoteliers / developers; 5 Legislators (I may not investigate the Cabinet and Ministers, and there is Parliamentary Privilege for Legislators, but they may provide evidence to assist investigations); site visit. *International:* 11 Caribbean, CARICOM, UN and OAS officials; 8 environment experts; 2 tourism experts; 2 US investors in the Caribbean

Key experts (tourism; EIA; waste; process):

Costas Christ – Keynote speaker, Caribbean Sustainable Tourism

Conference (hosted by Bermuda, April 2011). One of the world’s leading tourism experts. Editor at Large for National Geographic Traveler. Chairman of the World Travel and Tourism Council – Tourism for Tomorrow Awards. Recognized in 2008 as a ‘Tourism Visionary’ by the International Restaurant and Hotel Awards.

Dr. Peter Duinker – Professor and former Director of the School for Resource and Environmental Studies, Dalhousie University. Expertise includes environmental assessment, biodiversity assessment, forest management, collaborative inquiry and climate change. Past advisor on strategic environmental assessment to China’s State Environmental Protection Agency.

Dr. Edward K. Mull – Holds a doctorate in water chemistry and has worked in environmental chemistry for over 25 years. Specializes in contaminant measurement, site analysis and hazardous and waste management and disposal.

Kamoji Wachiira – Produced the Cedarbridge mold report in Bermuda and consults to governments worldwide. Senior climate change specialist for the Canadian International Development Agency. Global environment advisor to late Nobel Peace Laureate, Wangari Maathai. Facilitated intra-department and government/stakeholder relations through the Consensus Building Institute at MIT.

Given the plethora of unsubstantiated opinions that swirled around the TP SDO and development law, this Report includes “call-outs” (on green background / largely based on staff research) of related issues. The text on white background sets out the crux of the Report and findings. **Today’s Choices – Tomorrow’s Costs** reviews relevant international law and standards, Bermuda’s planning regime and the genesis of SDOs.

“It was never to me reason for irritation but rather a source of comfort when these bodies were asked to adjudicate on actions of my Government and Office and judged against it. One of the first judgments of our Constitutional Court, for example, found that I as President administratively acted in a manner they would not condone. From that judgment, my Government and I drew reassurance that the ordinary citizens of our country would be protected against abuse, no matter from which quarters it would emanate. Similarly, the Public Protector (Ombudsman) had on more than one occasion been required to adjudicate in such matters.”

(Nelson Mandela 2000)

Sustainable development doesn't mean no development at all.

I find it interesting how quickly the investors in Tucker's Point were able to come back to the table with a revised proposal.

It is part of the Westminster system in Bermuda that backbenchers and opposition members receive very little information or studies to support bills – unlike the UK which has a professional library and joint committee process.

The land Bermuda is getting from Tucker's Point is priceless.

A minority of people making a lot of noise over misinformation...

Government has done its due diligence.

The final SDO does nothing to reverse the downward trend in hotel inventory.

There is no reason why the Bermuda Government should tinker with the affairs of a private business just because the people responsible for that business can't otherwise fix its problems. If that were the case the Government might interfere in any failing business.

Without a strong tourist industry, critical airlift will be reduced and a decline in all sectors of the economy will accelerate, putting jobs at risk.

2: INTERNATIONAL LAW

Bermuda is not another world. There are international legal obligations that we are obliged to comply with. Indeed, we have committed to protect the environment, promote sustainable development and, in the course of doing so, equally weigh environmental and developmental considerations. This commitment arises from our signature on the 26th of September 2001 to the UK Charter on the Environment (“UK Charter”) entered into by the UK and the Overseas Territories (“OT”).

The UK is a signatory to the UN Convention on Biological Diversity 1972 (“Biodiversity Convention”) and the 1992 Rio Declaration on Environment and Development (“Rio Declaration”). A large portion of the UK’s obligations under the Biodiversity Convention pertains to the OTs, most of which are small, isolated islands that hold relatively large numbers of endemic species found nowhere else in the world. Over 340 endemic species have been recorded amongst the OTs (compared to about 60 in the UK). As of 1998, 247 of these endemic species are recorded from Bermuda (which tends to dominate OT species lists because of our extensive research and reporting over several decades).

The UK Charter is the route by which the UK complies with its international environmental obligations with respect to the OTs. As set out in the 1999 White Paper Partnership for Progress and Prosperity: Britain and the Overseas Territories, the primary responsibility for biodiversity conservation and wider environmental management has been devolved to OT Governments to regulate. With the support of the UK Government,

Environment Charter

BERMUDA



Guiding Principles for the UK Government, for the government of Bermuda and for the people of Bermuda

- 1 To recognise that all people need a healthy environment for their well-being and livelihoods and that all can help to conserve and sustain it.*
- 2 To use our natural resources wisely, being fair to present and future generations.*
- 3 To identify environmental opportunities, costs and risks in all policies and strategies.*
- 4 To seek expert advice and consult openly with interested parties on decisions affecting the environment.*
- 5 To aim for solutions which benefit both the environment and development.*
- 6 To contribute towards the protection and improvement of the global environment*
- 7 To safeguard and restore native species, habitats and landscape features, and control or eradicate invasive species.*
- 8 To encourage activities and technologies that benefit the environment.*
- 9 To control pollution, with the polluter paying for the prevention or remedies*
- 10 To study and celebrate our environmental heritage as a treasure to share with our children.*

A handwritten signature in black ink, appearing to read 'Jennifer Smith', written over a horizontal line.

Jennifer Smith
BERMUDA
26 September 2001

A handwritten signature in blue ink, appearing to read 'Valerie Amos', written over a horizontal line.

Valerie Amos
UNITED KINGDOM
26 September 2001

Environment Charter

Commitments

The Government of the UK is committed to:

- 1 Help build capacity to support and implement integrated environmental management which is consistent with Bermuda's own plans for sustainable development.*
- 2 Assist Bermuda in reviewing and updating environmental legislation.*
- 3 Facilitate the extension of the UK's ratification of Multilateral Environmental Agreements of benefit to Bermuda and which Bermuda has the capacity to implement.*
- 4 Keep Bermuda informed regarding new developments in relevant Multilateral Environmental Agreements and invite Bermuda to participate where appropriate in the UK's delegation to international environmental negotiations and conferences.*
- 5 Help Bermuda to ensure it has the legislation, institutional capacity and mechanisms it needs to meet international obligations.*
- 6 Promote better cooperation and the sharing of experiences and expertise between Bermuda, other Overseas Territories and small island states and communities which face similar environmental problems.*
- 7 Use UK, regional and local expertise to give advice and improve knowledge of technical and scientific issues. This includes regular consultation with interested non-governmental organisations and networks.*
- 8. Use the existing Environmental Fund for the Overseas Territories, and promote access to other sources of public funding, for projects of lasting benefit to Bermuda's environment.*
- 9 Help Bermuda identify further funding partners for environmental projects, such as donors, the private sector or non-Government organisations.*
- 10 Recognise the diversity of the challenges facing the Overseas Territories in very different socio-economic and geographical situations.*
- 11 Abide by the principles set out in the Rio Declaration on Environmental and Development (See Annex 2) and the work towards meeting International Development Targets on the environment (See Annex 3).*

The Government of Bermuda will:

- 1 Bring together government departments, representatives of local industry and commerce, environment and heritage organizations, the Governor's office, individual environmental champions and other community representatives in a forum to formulate a detailed strategy for action (See Annex 1).*
- 2 Ensure the protection and restoration of key habitats, species and landscape features through legislation and appropriate management structures and mechanisms, including a protected areas policy, and attempt the control and eradication of invasive species.*
- 3 Ensure that the environmental considerations are integrated within social and economic planning processes; promote sustainable patterns of production and consumption within the territory.*
- 4 Ensure that environmental impact assessments are undertaken before approving major projects and while developing our growth management strategy.*
- 5 Commit to open and consultative decision-making on developments and plans which may affect the environment; ensure that environmental impact assessments include consultation with stakeholders.*
- 6 Implement effectively obligations under the Multilateral Environmental Agreements already extended to Bermuda and work towards the extension of other relevant agreements.*
- 7 Review the range, quality and availability of baseline data for natural resources and biodiversity.*
- 8 Ensure that legislation and policies reflect the principle that the polluter should pay for prevention or remedies; establish effective monitoring and enforcement mechanisms.*
- 9 Encourage teaching within schools to promote the value of our local environment (natural and built) and to explain its role within the regional and global environment.*
- 10 Promote publications that spread awareness of the special features of the environment in Bermuda; promote within Bermuda the guiding principles set out above.*
- 11 Abide by the principles set out in the Rio Declaration on Environment and Development (See Annex 2) and work towards meeting International Development Targets on the environment (See Annex 3).*

the OTs committed to develop environmental policies and legislation. Bermuda met the obligation – to “bring together Government departments, representatives of local industry and commerce, environment and heritage organisations, the Governor’s office, individual environmental champions and other community representatives in a forum to formulate a detailed strategy for action” – through the 2003 Biodiversity Strategy and Action Plan and the 2008 Sustainable Development Strategy and Implementation Plan.

The obligations to integrate environmental considerations and to promote sustainable consumption (paragraph 3) were partially met by the establishment of the Sustainable Development Department within the MEPIS as well as through the work of the Departments of Environmental Protection and Conservation Services (the latter is within the Ministry of Public Works). The 2005 Report on the State of the Environment and the 2010 Report on the Total Economic Value of the Coral Reefs comply with the obligation to promote awareness (paragraph 10). Other commitments under the UK Charter include: protecting and restoring key habitats, species and landscape features (paragraph 2); ensuring that environmental impact assessments are undertaken before approving major projects (paragraph 4); open and consultative decision making on proposals that may affect the environment (paragraph 5); and, abiding by the Rio Declaration principles (paragraph 11).

The UK Charter is more than just a statement of good intentions. There is no enforcement mechanism, however, like the Tax Information Exchange Agreements that Bermuda has entered into in recent years, our signature on the UK Charter has the force of law. Our word must be our bond. While there is no annual reporting requirement, several of the other OTs voluntarily report to the Foreign and Commonwealth Office on their adherence to the letter and spirit of the UK Charter. These commitments effectively acknowledge that protecting the environment is not merely a national priority but is of international importance.

UK ENVIRONMENT CHARTER NEXT STEPS

Although the UK Charter represents valuable commitments by the governments of the UK and of the Overseas Territories, it is considered only to be a first step. Next steps include developing strategies or action plans to link these aspirational principles to real progress on the ground. Each UK OT should have in place, and the UK Government should ensure:

- *the inclusion of the Territory in UK’s ratification of appropriate international conservation conventions, including that on Biological Diversity*
- *appropriate legislation, and mechanisms to implement this, which fully meets these international obligations*
- *a properly staffed department, headed by a Minister or equivalent, within each UK OT Government, with responsibility for ensuring the conservation of biodiversity and the natural heritage*
- *an environmental NGO, supported and consulted by Government, to provide an independent voice on conservation matters*
- *plans for the conservation of biodiversity throughout the land- and sea-areas of the Territory, and the incorporation of biodiversity conservation in the plans for all sectors of the economy*
- *clear mechanisms to deliver these conservation plans, and for the provision of adequate funding*
- *a requirement for independent environmental impact assessment, open to public consultation and scrutiny, for any major development in the Territory, with expert evaluation to ensure that the common faults of such assessments are avoided*
- *a system of site-safeguard for the most important areas for biodiversity, with clear management plans developed and implemented in consultation with environmental NGOs*
- *the development of biodiversity targets, including restoration and recovery of damaged ecosystems and threatened wildlife populations, and action plans to achieve these*
- *the development of a time-tabled plan to compile existing data, to survey biodiversity and to conduct cross-sectoral reviews of policies that relate to biodiversity use and conservation*
- *ecological studies necessary to inform plans for sustainable use and conservation*
- *a system for monitoring and reporting publicly (including in fulfilment of international commitments) of the state of biodiversity and any impacts upon it*
- *plans for training programmes for key personnel and the integration of biodiversity conservation into education curricula and public awareness programmes.*

ECOS, British Association of Nature Conservationists, Vol 19, No. 1



THE 1992 UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, RIO DE JANEIRO

The commitment of Governments to require EIAs for major developments is not just a good, off-the-cuff idea. This commitment actually derives from the 1992 United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil. Often referred to as the **Earth Summit** the conference was unprecedented for a UN conference in terms of size, scope of concerns and duration (two weeks). Some 172 countries were represented, 108 at the level of Head of State. There were also 2,400 representatives of Non-Governmental Organizations (NGOs).

In parallel to the Earth Summit, there was a **NGO Global Forum** ("Forum") with approximately 17,000 attendees. The Forum had "consultative status" at the Earth Summit. This meant that on a daily, often hourly basis, the official Government delegates of the Earth Summit were plied with information and lobbied with policy papers developed during the 'people powered' deliberations in the Forum.

The principle documents and agreements amongst the nations were: Agenda 21 (a blueprint for sustainable development); the Rio Declaration; and the Statement of Forest Principles. Two legally binding instruments were opened for signature: the United Nations Framework Convention on Climate Change and the Biodiversity Convention, aimed respectively at slowing global warming and preserving the earth's biological diversity.

The Earth Summit's message – of the need for a global transformation of attitudes and behaviour with respect to the environment – was transmitted by almost 10,000 on-site journalists and heard by millions around the world. The Earth Summit influenced all subsequent UN conferences which have examined the relationship between human rights, population, social development, women and human settlements – and the need for environmentally sustainable development.

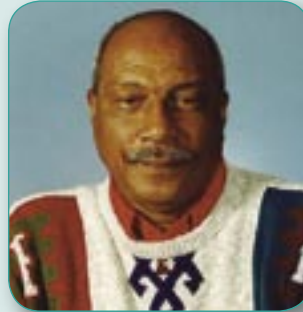
Principle 17 of the Rio Declaration commits governments: "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."

By signing on to the UK Charter and by providing in domestic legislation that the DAB may require an EIA for proposed development, (s. 10 Development and Planning (Application Procedure) Rules 1997), Bermuda signifies that it is not "another world". Rather, Bermuda joins the community of nations in ensuring that short-term development is weighed carefully against long-term environmental degradation.

BERMUDA IN RIO

Bermuda participated in two ways at the Earth Summit, both in policy input and symbolically.

One participant in the Forum was recently named Bermuda National Hero:



Dr. Pauulu Kamarakafego (formerly Dr. Roosevelt Brown). He was a key figure in the Forum and also acted as a resource for the Government delegation of the country of Vanuatu. It is a significant measure of the high international regard in which the late Dr. Kamarakafego was held that delegates at

the Forum elected Dr. Kamarakafego to be the Coordinator until 2002 of conferences and sustainable development work throughout the world for Small Island Developing States.

Symbolically, two kilos of Bermuda Pink Sand were exported (lawfully) to the Peace Monument which stands near Santos Dumont Airport as a lasting symbol of the Earth Summit and the Forum. This five-meter high concrete and ceramic monument was designed as two pyramids, one inverted on top of the other, creating an hourglass shape intended to symbolize the fact that time is running out for humanity unless it unites in a new spirit of global cooperation.

The Peace Monument contains soil samples from over 100 nations and territories, many of which were taken from sacred or historic sites. For example, the soil contributed by India was taken from Shakti Sthal, the site of the monument to the late Prime Minister Mrs. Indira Gandhi – who was the only Head of State to attend the prior UN Conference on the Environment in Stockholm in 1972.



Peace Monument in Brazil receives final earth samples

Photo courtesy Bahá'í World News Service

3: RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT

In Paragraph 11 of the UK Charter, the Government of Bermuda committed that we “will abide by the principles set out in the Rio Declaration on Environment and Development.” The 27 principles are intended to guide development considerations throughout the world. Of particular interest to this investigation, Principles 3 and 4 of the Rio Declaration, assert that development and environment are equal considerations and that environmental protection must constitute an integral part of the development process. Principle 10 provides for public consultation and access to information held by public authorities concerning the environment.

When there is no scientific certainty that damage will not result from a proposed development, then Principle 15 (“Precautionary Principle”) establishes that development should not take place. Put another way, this Principle requires that development must be preceded by scientific confirmation that either no environmental damage will occur or if there could be damage, it can be substantially mitigated. Essentially: “if in doubt, do no harm”. Principle 17 sets out – in mandatory language – that, prior to approval, an EIA shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment. EIAs provide the scientific evidence necessary for a determination under Principle 15 of whether proposals threaten serious or irreversible damage to the environment.

Indeed, in the UK Charter Bermuda has made a double commitment to require EIAs prior to granting approval:

- directly in paragraph 6 of the UK Charter with respect to “major developments”; and
- by incorporating the Rio Declaration with respect to developments “likely to have a significant adverse impact on the environment”.

Bermuda’s signature on the UK Charter creates a legal obligation to ensure that relevant development proposals are put through the sieve of EIAs and the Precautionary Principle prior to approval. This applies to all proposals, whether through the regular development applications process determined by the DAB or as applications for SDOs. Given Bermuda’s signature on the UK Charter, I find maladministration

RIO PRINCIPLES

At least since 1972 the community of nations has been developing standards and obligations to address the loss of species and economic degradation as well as pressure on the human environment due to climate change and other destruction resulting from man-made activities. In 1992 at the “Earth Summit” in Rio de Janeiro nations recognized the global interconnection of the impact of such destruction. Signatory nations committed to preemptively measure and mitigate risks to the environment and to promote sustainable development of the physical, human and social environments.

In addition to specific multilateral treaties such as the Convention on Biodiversity, the nations committed to be guided in their policies, laws and regulations by the Principles set out in the Rio Declaration on Environment and Development. The Principles of particular relevance to this investigation include:

Principle 3 *The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. That is, development and environment are equally important.*

Principle 4 *In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and*

cannot be considered in isolation from it.

Principle 10 *Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*

Principle 15 *In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*

Principle 17 *Environmental Impact Assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.*

due to a mistake of law in the approval of proposed developments that are “major” or “likely to have a significant adverse impact on the environment” prior to EIAs being conducted. A number of court decisions in the UK hold that EIAs provide the information necessary to make the determination of whether or not to approve development proposals at the outline (or ‘in principle’ stage). The common law confirms that reasons must be given if no EIA is deemed necessary. Further, direct public consultation is an essential part of the EIA process.

PRECAUTIONARY PRINCIPLE

The World Charter for Nature, which was adopted by the UN General Assembly in 1982, was the first international endorsement of the precautionary principle. The principle was implemented in an international treaty as early as the 1987 Montreal Protocol and, among other international treaties and declarations, is reflected as Principle 15 of the 1992 Rio Declaration:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

That is, if there is no scientific proof about whether or not a proposed action

could cause harm to the public or the environment, then the burden of proof that it is not harmful falls on those proposing the action.

The principle implies that there is a social responsibility to protect the public from exposure to harm when scientific investigation has found a plausible risk. These protections can be relaxed only if further scientific findings emerge that provide sound evidence that no harm will result.

The Precautionary Principle may be invoked only when the three preliminary conditions are met

- identification of potentially adverse effects
- evaluation of the scientific data available and
- the extent of scientific uncertainty.

Essentially, Principle 15 requires: if in doubt, do no harm.



Photo: Department of Communication and Information

4: COMMON LAW

Beyond our obligations at international law under the UK Charter, there are common law precedents that are pertinent to Bermuda. Our obligations under the UK Charter mirror the obligations imposed on UK planning authorities by the European Directive 85/337/EEC (European Economic Community). Therefore, UK case law is relevant in determining the nature and extent of obligations assumed by Bermuda as a signatory to the UK Charter. Decisions of the Privy Council and the House of Lords (now the UK Supreme Court) dealing with similar legislation are binding on the Supreme Court of Bermuda. Decisions of lower UK courts are not binding but are likely to be persuasive for Bermuda decisions. Essentially, the jurisprudence is clear that, for a development application that is likely to have significant adverse impact on the environment, an EIA ought to be conducted:

- where there is an obligation to conduct an EIA, then this is a non-discretionary procedural step that must be done prior to (even in principle) approval
- EIAs must be conducted at the earliest possible stage in the application process
- EIAs enable decision-makers to decide whether applications should be approved
- if approved, EIAs assist decision-makers to determine what mitigation or other conditions should be attached to the approvals
- reasons must be given if decision-makers decide not to require an EIA to enable objectors to decide on what grounds they may appeal that decision
- approval may be judicially reviewed, even if the approval was granted through an affirmative resolution of the Legislature (in our case, the SDO is subordinate legislation under the DPA and therefore may be judicially reviewed)
- even if the decision to approve the application would have been the same with or without an EIA, a Court cannot retroactively dispense with the procedural requirement of an EIA
- in a multi-stage approval process an EIA may be conducted before final approval if the environmental impact was not known or could not be anticipated before outline or 'in principle' approval was granted
- a Court is unlikely to quash an 'in principle' approval granted without obtaining an EIA if the EIA conducted at the reserved matters stage is comprehensive and credible
- public consultation is an essential component of an EIA process, whether or not an EIA is required to be conducted by statute.

EIA REQUIRED

An EIA must be carried out at the earliest possible stage. *"The information must be provided prior to the grant of Planning permission and that applies whether the application is for full or for outline Planning permission"* [R v. Rochdale Metropolitan Borough Council ex parte Tew (1999) 3 PLR 74 and R v. Rochdale MBC exp Milne (2000) 81 P&CR 365].

Reasons must be given for a determination not to subject a planning application to an EIA. If reasons are not set out in the decision document then, upon request of interested parties, *"the authority is obliged to communicate the reasons for the determination or the relevant*

information and documents on which it is based". The reasons and necessary supplementary information provided to interested parties must be sufficient to *"enable them to decide whether to appeal against that decision"*. [R (oao Mellor) v. Secretary of State for Communities and Local Government (2010) ENV LR 2] the UK Court of Appeal citing a European Court decision (binding law in the UK).

A 2010 decision of the Supreme Court of Bermuda confirmed that sufficient reasons must be given for a decision by the Minister (in this case to grant approval for development despite rejection of the application by the DAB) [BEST v. Min. of Environment (2008) No. 321].

MULTI-STAGE APPROVAL PROCESS

The consent procedure for granting planning permission can comprise more than one stage. *"A developer cannot commence works in implementation of his project until he has obtained reserved matters approval. Until such approval has been granted, the development is still not (entirely) authorised."* Permission 'in principle' may be quashed *"if significant adverse impacts on the environment are identified at the reserved stage and it is then realised that mitigation measures will be inadequate...If it is likely that there will be significant effects on the*

environment which have not previously been identified, an EIA must be carried out at the reserved matters stage before consent is given for the development". [R v. London Borough of Bromley ex parte Barker (2007) 1 AC 470].

As a practical matter, even if environmental impact could be identified but was overlooked at the 'in principle' approval stage, it is likely that a court would decline to quash an *"in principle permission granted without obtaining an EIA"* if the EIA undertaken at the reserved matters stage is comprehensive and the procedure to conduct it is credible.

SDO JUDICIAL REVIEW

Even if subject to the affirmative resolution procedure, a Statutory Instrument (such as a SDO which is subordinate legislation) may be judicially reviewed (see [R (Norris) v. Secretary of State for the Home Department (2006) 3 All ER 1011; Toussaint v. Attorney General of Saint Vincent and the Grenadines (2007) 1 WLR 2825]).

However even *"[a] Court is...not entitled retrospectively to dispense with the requirement of an EIA on the ground that the outcome would have been the same or that [the decision maker] had all the information necessary to enable them to reach a proper decision on the environmental issues"*. [Berkeley v. Secretary of State for the Environment (2001) 2 AC 603, 614-616].

BELIZE CASE EXCERPTS

Belize Alliance of Conservation Non-Governmental Organizations v. The Department of the Environment (2004) UK PC6: The Privy Council affirmed that governments must comply with any obligation (statutory or otherwise) to consider or require an EIA procedure. After an EIA is conducted, the substantive decision of whether to approve the development application is *"a matter of national policy which a democratically elected Government can decide."*

In this case, the appeal by objectors to the development failed because the Privy Council determined (by only a 3 to 2 margin) that the EIA had contained the geological, archaeological and environmental evidence and analysis needed to inform the consideration of the development application. The Privy Council was of the view that a national symposium attended by 300 people and a subsequent public hearing constituted adequate public consultation.

"The Belize legislation has much in common with legislation in a number of other countries which require some sort of environmental study before significant projects may proceed. It resembles, for example, the regimes established for Member States of the European Union by Council Directive 85/337/EEC (as amended)...What each system attempts in its own way to secure is that a decision to authorise a project likely to have significant environmental effects is preceded by public disclosure of as much relevant

information about such effects as can reasonably be obtained and the opportunity for public discussion of the issues which are raised...What these systems also have in common is that they distinguish between the procedure to be followed in arriving at the decision and the merits of the decision itself. The former is laid down by statute and is binding upon the decision-making authority. The latter is entirely within the competence of that authority."

The dissenting judgment argued that a design change required additional information that was not contained in the EIA. Therefore, the information available to the public in the EIA was actually not enough to satisfy the procedural requirement that a complete EIA had been produced:

"Belize has enacted comprehensive legislation for environmental protection and direct foreign investment, if it has serious environmental implications, must comply with that legislation. The rule of law must not be sacrificed to foreign investment, however desirable (indeed, recent history shows that in many parts of the world respect for the rule of law is an incentive, and disrespect for the rule of law can be a severe deterrent, to foreign investment). It is no answer to the erroneous geology in the EIA to say that the dam design would not necessarily have been different. The people of Belize are entitled to be properly informed about any proposals for alterations in the dam design before the project is approved and before work continues with its construction."

5: IMPACT ASSESSMENTS

The genesis of EIA can be traced back to legislation drafted in the United States over 40 years ago. The U.S. National Environmental Policy Act 1969 provided a framework for the EIA process to be used *“as a means to integrate the generation and dissemination of environmental information, and foster collaboration among the diverse set of public and private actors and stakeholders which characterize major, environmentally controversial decisions.”*

International adoption of EIA practice was solidified by the Rio Declaration. EIAs are now part of national legislation, regulations and other formal procedures in over 100 countries throughout the world. The substance of the impact assessed has evolved from an initial focus on the biological and physical components of development to a wider focus today that includes the chemical, visual, cultural, economic and social components of the total proposed development. The principles, methodologies and scope have also progressed exponentially since the 1992 Earth Summit. Impact Assessment is said to easily outpace any other area of environmental or planning law in the number of new court cases generated in the UK.

The International Association for Impact Assessment defines EIA as *“the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made”*. An EIA, which is usually project-specific, draws together expert scientific study, policy analysis and public input. The EIA is an objective, independent check on the optimistic projections of proponents of a development as well as on the worst case pessimism of detractors. To be credible, EIAs should be produced by independent professional bodies with no financial or other interest in the proposed projects. In many jurisdictions, it is a standard business cost for EIAs to be paid for by developers and then for Governments to evaluate them by their own appropriate agencies and/or by independent, reputable consultants (chosen by Governments but also paid for by developers).

Technically, the Environmental Impact Statement (“EIS”) is a different document, most often produced by the developer. It summarizes the results of the EIA in accessible language that enables the public to evaluate the potential impacts of the predicted effects of proposed development. The primary value of an EIS is to explore how identified adverse effects can be mitigated and to justify why alternatives may or may not work. In some instances, an EIS is produced by a Government instead of the developer. Effectively then, the EIS is the statement of the decision that sets out the Government’s views on the significance of the project’s environmental effects, any mitigation measures or follow-up programs deemed appropriate as well as the reasons for the decisions to grant or decline development applications. Whether produced by the developer or the Government, the EIS sets out the response and proposals to mitigate the risks identified in the EIA. Thus the public as well as decision-makers should be privy to both the EIA and EIS for each project.

The recent emergence of a second generation of Impact Assessment – integrated Strategic Environment Assessment – is linked to national planning and overall sustainable development decision-making at the highest levels. In addition, more specialized assessment of consequences of certain proposals may be needed such as: Social Impact Assessment – often done for proposed tourism development; Health Impact Assessment; and, Biodiversity Impact Assessment. However specialized, the primary value of Impact Assessment is to: (a) identify risks of proposed development; (b) determine mitigation steps or alternatives; and (c) gather enough information to inform public consultation and good decision-making. According to the International Association for Impact Assessment: the *“long-term reference point of environment assessment is sustainability of development”*.

*“It is a major oversight of your SDO law if there is no EIA.
An environmental management plan is the only vehicle you have to
ensure that development is environmentally friendly.”*

(Caribbean Official)

GREAT GUANA CAY

Between 2005 and 2009, the 9 mile long island of Great Guana Cay in the Bahamas had been the centre of a controversy reaching as far as the United Nations and the Privy Council. When the Government of the Bahamas agreed to the building of a resort with a marina and golf course, the 150 residents of Guana Cay began a campaign to save their islet from overdevelopment.

The Government encourages investments that would be beneficial to all of the Bahamas, particularly those that will generate local employment. The \$500 million luxury resort community (Baker's Bay Golf & Ocean Club) was viewed as an important opportunity for development of a relatively uninhabited area. The Government allocated Crown and Treasury land (land forfeited for tax reasons) to this project which involved large scale infrastructure projects both on land and in the sea.

In return for the Government's concessions, the developers were required to build or ensure:

- more than half of the Government land would be protected as a nature preserve run by a specially-created public foundation
- land would be used for infrastructure – a reverse osmosis plant, sewage treatment plant, power station, waste disposal site and dry dock facilities
- land to be leased temporarily as a construction staging area
- land to be leased for the marina
- retail operations, entertainment and visitor services at Baker's Bay to be operated by Bahamians
- a community centre for police and fire services
- Customs and Immigration facilities and a clinic
- a five-acre waterfront park next to the nature reserve featuring a range of public facilities, including restrooms and a dock.

The development would have far reaching economic, social and environmental consequences. Residents questioned the Government's commitment to saving uninhabited land for future generations and were adamant that the development would destroy marine life and sensitive ecosystems. They asserted:

- the dredging of the harbour would irreversibly destroy the reef (that is only 25 yards off shore)
- development would cause the Hawksbill Creek Turtle to become extinct
- large mega yachts would destroy the bonefishing flats
- chemical run-off from the golf-course would poison the marine environment and reef
- the mangrove forest would be destroyed.

The residents marched, signed petitions and started a not for profit organization – Save Guana Cay Reef Association ("SGCRA"). They earned international support from organizations throughout the world including the Global Coral Reef Alliance, Ocean Futures Society, Sierra Club and coral ecologists in Canada, Jamaica and the US. In 2007, SGCRA addressed the United Nations Commission on Sustainable Development with scientific documentation and photographic evidence of their concerns about unchecked development throughout the Bahamas.

The residents also challenged the Government's approval of this development in the Courts all the way to the Privy Council. Their legal objections were based on the argument that public consultation within the EIA process was deficient. According to the objectors, three public meetings were scheduled with less than 24 hours notice but one was cancelled. Within a week of the Government stating they were in the "early planning stages", it was announced that the plan was approved. Critics charged that there was secrecy in the planning deal.

The objectors lost – at all levels of the judicial process – in their bid to stop the development. However, the Privy Council did affirm the principle of public consultation: "the public had a legitimate expectation of consultation arising out of official statements recognizing the need to take account of the residents' concerns and wishes." Further, the Privy Council noted the need for comprehensive legislation to protect the environment: "The Bahamas has no comprehensive legislation for environmental protection, or public consultation on the disposition of public lands...The Bahamas are known throughout the world for their natural beauty. It is also well known that the rich, natural resources and especially their coral reefs are at risk from indiscriminate development" [Save Guana Cay Reef Association v. R (2009) UK PC 44].

Prior to this decision, for well over 15 years, the practice in the Bahamas was that EIAs were required for protected lands and encouraged for non-protected lands. Largely as a result of this case, a new law as of December 2010 requires EIAs (including adequate public consultation) for all major developments on all lands prior to approval.

The four years of objections delayed but did not deter the investors from proceeding. The Baker's Bay developers believe that EIAs and public consultation ultimately assists them to develop the best possible product. They were conscientious to mitigate risks identified by the EIA. For example, the third largest coral barrier reef in the world abuts the resort and is a major tourist attraction. In order to avoid irrigation and other run-off into the ocean, they lined the golf course with a polyurethane basin to catch, filter and recycle run-off into a retention tank. Building the golf course without the lining would have cost \$12 million. With this precaution, the cost was \$21 million. But the developers considered it to be in the long-term protection of the natural asset, and thus their investment, to undertake this extra cost: "it behooves governments and developers to understand the impact of the environmental footprint. The last thing we want to do is damage the environment – that only hurts our product". The developers proposed the establishment of the 70 acre nature preserve as an integral part of the project. It is open to the Bahamian public.

In the Bahamas, financial due diligence is relatively transparent. The Government scrutinizes not only projections, but also the track record and successes of investors and their local partners. Early projections about the impact of proposed investments on new jobs, contractor and vendor opportunities, payroll and other taxes and so on are disclosed to the public. Further, investors are required to put up millions of dollars in a cash performance bond – which provides an additional level of comfort to the public.

6: PUBLIC CONSULTATION AND DISCLOSURE

No one has come forward to assert that less information is preferable to more information. In order for civil servants to assemble all pertinent information, they must be able to seek out and analyze data and perspectives beyond the knowledge and vision of developers. The goal is to gather a diversity of views especially regarding the potential threats posed to the environment by the proposed development as well as of mitigation of risks, alternatives and trade-offs. Public consultation is not merely a fundamental component of environmental assessment but is indeed one of its purposes. Although not bound by all international standards, it is important for Bermuda to be aware of them in order to choose which may be of value to us.

RELEVANT PUBLIC CONSULTATION STANDARDS

INTERNATIONAL

1992 Rio Declaration

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided. Taken from Rio Declaration – Principle 10

1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

In the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns. The public needs to be aware of the procedures for participation in environmental decision-making, have free access to them and know how to use them.

United Nations Environment Programme (UNEP)

Public involvement is a fundamental principle of EIA. The inclusion of the views of the affected and interested public helps to ensure the decision making process is equitable and fair and leads to more informed choices and better environmental outcomes. From the EIA Training Resource manual – Second edition 2002.

Organisation for Economic Co-operation and Development (OECD)

[Public Consultation] involves actively seeking the opinions of interested and affected groups. It is a two-way flow of information, which may occur at any stage of regulatory development, from problem identification to evaluation of existing regulation. It may be a one-stage process or, as it is increasingly the case, a continuing dialogue. Consultation is increasingly concerned with the objective of gathering information to facilitate the drafting of higher quality regulation. Taken from OECD background document.

European Economic Community Directive 85/337 (EEC) as amended

The public shall be informed, whether by public notices or other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

- (a) the request for development consent;*
- (b) the fact that the project is subject to an environmental impact assessment procedure;*
- (c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;*
- (d) the nature of possible decisions or, where there is one, the draft decision;*
- (e) an indication of the availability of the information gathered;*
- (f) an indication of the times and places where and means by which the relevant information will be made available;*
- (g) details of the arrangements for public participation made.*

Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

- (a) any information gathered pursuant to Article 5;*
- (b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed;*
- (c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information (1), information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.*

The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.

Bermuda does meet its public consultation obligation under paragraph 5 of the UK Charter for proposed developments that go through the normal application process via the DAB:

- proposed developments are posted in the official Gazette
- the public may view related planning and building files at Planning and
- there is a two-week period for public comment and objections.

However, these applications are only for proposals on lands that are already zoned for development. There is no similar public consultation process for lands that are not zoned for development and therefore require a SDO. The form and process of public consultation for SDO applications must be determined by the Government of Bermuda. It has been asserted that the 2011 amendment to the DPA meets this

“We have to balance economic value versus environmental value. Both values have to be analyzed and described. These are the things that you have to know before you make a decision.”

(Caribbean Official)

“Another thing that must be understood here is the importance of tourism to Bermuda’s survival – it is one of the pillars of our economy, and generates thousands of jobs for our restaurateurs, sports and leisure operators, taxi drivers, retail stores...the list is endless.”

(Bermuda Resident)

Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making.

International Association for Impact Assessment

The process should provide appropriate opportunities to inform and involve the interested and affected publics, and their inputs and concerns should be addressed explicitly in the documentation and decision making. Taken from the Principles of Environmental Impact Assessment Best Practice

COMMON LAW

The principle that public consultation is necessary in order to identify risks early enough is amplified in the judgement of R v. Rochdale Metropolitan Borough Council, ex parte Tew (2000) Env. LR 879. The central issue in this case was whether “outline planning permission” (which is similar to permission

‘in principle’) defeats the value of a subsequent EIA:

The decision to grant planning permission has to be taken in “full knowledge of the project’s likely significant effects on the environment. It is not sufficient that full knowledge will be obtainable at some later stage. By then it will be too late to go back on the principle of development having been granted by the outline planning permission, and the public will not have the same statutory right to be consulted and so to contribute to the environmental information which must be considered by the Local Planning Authority before planning permission is granted...Once outline planning permission has been granted, the principle of the development is established. Even if significant adverse impacts are identified at the reserved matters stage, and it is then realised that mitigation measures will be inadequate, the Local Planning Authority is powerless to prevent the development from proceeding.”

obligation. This new legislative process certainly alerts the public that a SDO is to be voted on and even to the views of the Legislators. However, this legislative process does not provide the public with direct access to the science revealed by an EIA, the assessment of civil servants or the responses presented in an EIS by developers regarding alternatives and mitigation of risks.

Decisions of the Privy Council and House of Lords give some guidance about what should constitute the form and scope of adequate consultation. (Most of the House of Lords decisions review UK compliance with the international obligation set out in the European Directive 85/337 (EEC) as amended. Bermuda is not bound by that Directive but these cases do provide precedential guidance on how the Privy Council may determine our similar obligations set out in the UK Charter and Rio Declaration):

- what an EIA regime seeks to secure: *“is that a decision to authorise a project likely to have significant environmental effects is preceded by public disclosure of as much reasonable relevant information about such effects as can reasonably be obtained and the opportunity for public discussion of the issues which are raised”* [Belize Alliance of Conservation NGOs v. Department of the Environment (2004) UK PC 6].

“Public services should be open to the public, by definition and default.”

(André Marin, Ombudsman for Ontario)

COMPARATIVE PRACTICE: THE BAHAMAS

The guiding principle for the Bahamas is the Precautionary Principle as set out in the Rio Declaration. The Bahamas will approve applications for development if it can be assured that there is little overall impact. This consideration is guided by science and policy. If the impact is too large or cannot be determined, then permission is not granted. Often developers argue that they must spend their money immediately on a proposed development. Then, when economic circumstances change, they come back for more intense development.

Therefore, we are very careful from the front end. There is a clear intent by the Office of the Prime Minister and the National Economic Council to balance economic development with sustainability. The essential questions: Are we doing the right thing? Is this the right time?

In the Bahamas, BEST is the Bahamas Environment, Science and Technology agency which reviews, legislates and proscribes physical planning for all development. The usual process:

- *the financial viability of a proposal is determined*
- *permission ‘in principle’ is granted, subject to a comprehensive EIA*
- *the EIA operates to inform, monitor and guide the application and development*
- *the Government engages independent expertise (local or overseas) to review the EIA.*

Since 2010, the law requires full and comprehensive EIAs for all commercial development even when the lands are not protected. This is firmly and strictly enforced for hotel development and is non-negotiable. Although required by

law only since last year, this policy has been in practice for some time. In the last 15 years no major hotel development or oil lease has been approved without a comprehensive EIA.

The EIA must be very detailed – a higher standard of scrutiny is applied for protected areas. EIAs are paid for by developers who assume this cost as part of the risk of bringing their developments to fruition. The law also provides that if the Government deems it necessary to engage independent (local or overseas) experts to review the EIAs submitted by developers, then this cost must also be borne by the developers.

A comprehensive EIA process necessarily includes a robust public input and comment phase. Major developments are not left to the scrutiny only of BEST and other Government agencies or even of the organizational stakeholders (such as the Bahamas National Trust and Bahamas Reef & Environment Foundation). There is a strong environmental movement in the Bahamas who do march, blog and petition if they feel that even the strict EIA and approval process has not served their needs. They keep a keen eye on the Bahamas National Trust which is partially funded by the Government to ensure that the public interest is not compromised.

The Bahamas is a signatory to the Biodiversity Convention, Ramsar Convention and most other international treaties that set standards for environmental protection. The Bahamas is committed to protection of 20% of the marine environment and 20% of the terrestrial environment by the year 2030. The country also adheres to the letter and spirit of the Millennium Development Goals which are not obligations but do have strong guidance for protection of the environment into the future.

- citizens have a right to an: *“inclusive and democratic procedure...in which the public, however misguided or wrong-headed its views may be, is given an opportunity to express its opinion on the environmental issues”* [Berkeley v. Secretary of State for the Environment (2001) 2 AC 603].
- if there is a legitimate expectation of consultation, then it must be proper consultation: *“To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken”* [Save Guana Cay Reef Association v. R (2009) UK PC 44 citing R v. Brent London Borough Council ex parte Gunning (1985) 84 LGR 168]

“Jamaica has a very similar process as the Bahamas with independent review institutions. Indeed, there is a groundswell across the Caribbean of environmental sensitivity to protect our small space.”

(Caribbean Official)

COMPARATIVE PRACTICE: CURAÇAO

Development is governed by two Planning guidelines: an overall Island Development Plan and local Master Plans for specific areas.

There is considerable public input into the Island Development Plan (which should be re-evaluated every 5 years). There is a sizeable conservation lobby both amongst the general public and within the rural and urban service of Planning. Review and comment is also provided by a Constitutional Advisory Board, which does not have decision power but is highly persuasive. This board is comprised of senior proven people in the community, acting on behalf of the public, but appointed by the Head of Government for 4-year terms. Although appointed by Government, they are expected to act independently.

The Island Development Plan sets out zones for: Residential development (density three buildings per hectare); Open spaces (that may be available for future development); Agriculture; and Nature Conservation Areas (which may be overlaid on public and private lands). There are also four “white space” areas in the east of the island that are not zoned at all. Before development is approved for those areas, studies must be done of both economic and environmental issues.

Details of development in accordance with individual Master Plans are approved by the Cabinet, after advice of the Constitutional Advisory Board, but with little public input (which, in any event, cannot change the zoning set out in the Island Development Plan).

Zones can be changed each time the Island Development Plan is re-evaluated but only after public consultation. In interim years, zones can be changed by one of two processes: Dispensation Procedure or by Law.

The Dispensation Procedure is used for lands where proposed development

may result in minimum impact on protected lands. Plans are put forward and subject to a vigorous public objection process. Studies are required:

- Environmental impact assessment
- Economic value of development proposals, including impact on jobs and proposed development of infrastructure.

Changes to the conservation zoning through law essentially amounts to a partial re-evaluation of the Island Development Plan. Comprehensive studies are also required and the process entails full public hearings.

Direct public consultation as well as the wisdom of the more neutral voices of the Constitutional Advisory Board have been instrumental in achieving consensus in those cases where alternatives to proposed development that would have adverse impact on the environment were not feasible. In the Curaçao experience, “Conservation and development can go together”. For example:

The North Coast is protected from development due to the pristine and unique cave habitats for several species of bats. However, energy is a national priority and wind farms are central to Curaçao’s long-term renewable energy strategy. All studies pointed to the same area of the North Coast as the best place to erect windmills to catch the strong, year-round Trade Winds.

Windmills and bats cannot co-exist – bats would be eviscerated by colliding with the windmills. So the Government conducted more and exacting research of both the habitats and windmill technology. They discovered that the Curaçao species of bats do not fly beyond 40 metres from their caves. The wind farms could be built beyond that distance and still capitalize on the winds of the North Coast.

- Consultation is adequate if there is access to documents and opportunities to pose questions: *“The public seems to have been given a reasonably full picture of what was proposed, with copies of documents being on offer, and the main author of the EIA being present at the meeting.”* [Save Guana Cay Reef Association v. R (2009) UK PC 44]. In this case, the Privy Council rejected an appeal based on an argument that – because a third promised public meeting did not materialize – two public meetings did not constitute adequate consultation.
- The public is not expected to engage in a “paper chase” to piece an environmental assessment together. The EIA must *“constitute a single and accessible compilation produced by the applicant at the very start of the application process, of the relevant environmental information and the summary in non-technical language.”* [Berkeley v. Secretary of State for the Environment (2001) 2 AC 603, 615].
- Public consultation provides opportunities to develop ideas to mitigate risks, explore alternatives and develop widespread buy-in that may be lost without it. Nevertheless, public consultation does not always mean that development proposals will be changed: *“taking their concerns and wishes into account does not of course mean that the plans for the development must necessarily be changed”*. [Save Guana Cay Reef Association v. R (2009) UK PC 44].

An accessible public consultation process ensures that the EIA is methodical and ultimately, trusted. The voices of objectors to proposed developments are particularly valuable because they often bring to the process credible alternatives that developers, in their enthusiasm to accomplish corporate goals, may not have thought of. Our tourism expert notes: *“The more public and transparent the process, and the more access to the documents prepared by the developers, the consultants who carry out and evaluate the EIA and other assessments, and the submissions of interested parties, the better will be the transparency of the decision and the business success of the development.”*

In the landmark case of *Berkeley v. Secretary of State for the Environment* (2001) 2 AC 603, the House of Lords described the UK Government’s *Environmental Assessment: A Guide to the Procedures* as the best statement of the public consultation aspect of an EIA:

COMPARATIVE PRACTICE: BRITISH VIRGIN ISLANDS

28-7-5, these are the number of days that are attached to various steps within the public consultation segment of the Impact Assessment (“IA”) process in the British Virgin Islands.

If the Town & Country Planning Department (“TCPD”) requires an Applicant to submit an IA, at least two public meetings are scheduled in order to allow public input. All logistical arrangements associated with facilitating the public meetings, including the hiring of a stenographer to record the discussion and the publication of the public meeting notices, are the responsibilities of the Applicant. The Applicant must make all arrangements within 28 days.

The meeting, chaired by the Planning Authority (similar to Bermuda’s DAB), is an opportunity for the Applicant to present the details of the proposed project to the public. It is critical to note that this first public meeting is held in order to discuss and determine the project’s Scoping Study and the Terms of Reference. The Applicant has not even produced the IA at this juncture.

Within seven days of the meeting the stenographer, not the Applicant, arranges for the minutes to be sent directly to TCPD. TCPD also receives the public’s written comments within 28 days of the meeting. Then, with the benefit of all opinions and views (the meeting discussion, Scoping Study and IA Terms of

Reference) the Applicant prepares and then submits the IA.

TCPD reviews the IA submission and distributes the submission to the relevant Government departments which can include Physical Assessment (e.g. Public Works, Electrical), Environmental Assessment (e.g. Health, Conservation) and Social and Economical Assessment (e.g. Tourist Board, Immigration). TCPD may also hire an expert to review the submission.

If TCPD makes a positive recommendation the Applicant then arranges a second public meeting in order to explain how the public’s concerns are addressed and the findings of the IA. Although the same 28 day period is given for the Applicant to arrange the second meeting, the stenographer must submit the minutes to TCPD within five days (not seven). All comments made at the public meeting must be incorporated in the final IA submitted to TCPD. TCPD makes its recommendation to the Planning Authority, who can deny the application or approve it with or without conditions.

If the project is approved the Applicant receives a letter from the Planning Authority. The Applicant then submits their design plans to TCPD for a final decision. Although TCPD and other Government departments can conduct site inspections, the Applicant is responsible for hiring a Special Inspector who will submit monthly reports to TCPD regarding the progress of the project and its compliance with the approval granted.

The general public's interest in a major project is often expressed as concern about the possibility of unknown or unforeseen effects. By providing a full analysis of the project's effects, an environmental statement can help to allay fears created by lack of information. At the same time, it can help to inform the public on the substantive issues which the local planning authority will have to consider in reaching a decision. It is a requirement that the environmental statement must include a description of the project and its likely effects together with a summary in non-technical language. One of the aims of a good environmental statement should be to enable readers to understand for themselves how its conclusions have been reached, and to form their own judgments on the significance of the environmental issues raised by the project.

Our tourism expert notes: *"Any controversial decision that could impact the environment and the lives of residents for decades and generations to come can only benefit from the solicitation of public comment and opportunities to present considered opinions. Whatever the ultimate decision, the fact that the country has gone through a process of listening to the public is to everyone's benefit, and provides the counterweight of transparency to any accusations of behind-closed-doors deal-making."*

As important and laudable a step as the 2011 amendment to the DPA is, it must be noted that, by and large, other countries have opted for processes that allow more direct opportunities for public consultation. This is deliberately a step away from the arena of partisan politics. Whether there is regulation requiring public consultation (as in Belize) or not (as in the Bahamas), the Privy Council and UK Supreme Court cases are not only binding on Bermuda but also are instructive with regard to the standard of public consultation that would meet our obligations under the UK Charter and the Rio Declaration.

"If there is no struggle there is no progress. Those who profess to favor freedom, and yet depreciate agitation, are men who want crops without plowing up the ground."

(Frederick Douglass)

"In handing off the decision to the Legislature, the Minister was required by principles of natural justice to also hand off all relevant information and remove himself completely as the conduit / filter for what and what quantity of information they should have. In our view Legislators must be provided with not only all available information, but also unfettered access to any additional information that they consider relevant to the decision."

(Bermuda Resident)

"So let's raise the tone of the debate. Too often at the moment we look like schoolchildren squabbling over a toy – our most precious toy, the Earth. And the danger is that as we pull in opposite directions in our global tug of war, the Earth will end up broken – or at least unable to sustain human life. That is the worst case scenario – or maybe, from the Earth's point of view, the best."

(Roz Savage – Ocean Rower; Fellow, Royal Geographic Society)

7: DEVELOPMENT LAWS AND PLANS

Bermuda is not ignorant of or immune to the concept of public consultation. The four Development Plans since 1974 entailed considerable public consultation. Similarly, the Sustainable Development Strategy and Implementation Plan of 2008 was drafted after a thorough and unprecedented process for public, technical and expert input. The first zones for commercial, tourism and residential development were set out in the 1974 Development Plan. The 1983 Plan introduced environmental zoning overlays. This was quite controversial as some large land owners in particular saw their development rights reduced due to their lands being identified as having significant environmental value that ought to be protected from development. There was a robust objection and Tribunal process resulting in significant reductions in the proposed conservation zoning. (There is an argument that there should have been, and still should be, either compensation or tax and other incentives to encourage private landowners to conserve their lands.) In the consultation stage for each subsequent development plan there is a further opportunity for owners to seek reduction in conservation zoning.

Given this thorough process, it was expected that remaining lands with conservation zoning were so environmentally sensitive that they warrant protection from development for all of time. Another route for land to be brought under conservation protection (other than through development plan zoning) is agreements made under s. 34 of the DPA in which private land-owners commit to protect land from development permanently. However, in 1999 a Bermuda Court of Appeal case [Min. of Environment v. Bda. National Trust (2003) L.R. 41] overturned a s. 34 agreement on the basis that it is a private covenant, subject to be varied by the parties or their successors. This decision means that zoning through the Development Plans is the only reliable avenue for the permanent protection of land. Hence, since that case, conservationists have been even more diligent than in the past to object to proposals to lift conservation zoning.

During the 1983 Development Plan consultation little thought was given to how protected land should be treated if the zoning was lifted and the land becomes open to development. In the ideal, no more conservation land should be opened for development. However, there is an argument that if zoning is lifted, land that warranted protection should not be the same as land that was not thought worthy of protection. Therefore, special generic restrictions could apply, regardless of proposed zoning when such land is opened up to development. That is an issue that could be addressed during consultation for the next Bermuda Plan.

“One way to open your eyes is to ask yourself, ‘What if I had never seen this before? What if I knew I would never see it again?’”

(Rachel Carson – Her book, *Silent Spring* [1962], inspired the environmental movement)

IS THE PLAN A POLICY OR REGULATION?

Despite the mandatory language of the Bermuda Plan, there is a view that the Plans are merely policy and do not bind the DAB. While it is certainly the case that the Plan indicates those circumstances where the DAB has discretion to deviate from the standards set out in the Plan, the language of the DPA and Plan itself makes it clear that the Plan is more of a regulatory vehicle than a mere statement of policy or guidance.

Section 43 of the DPA sets out certain matters for which the Minister may make regulations. Section 6 of the DPA provides that, in addition to zoning, the Plan formulates policy and proposals in respect of development. Most of these proposals relate to the matters set out in s. 43. In any event, the Bermuda

Plan 2008 defines itself as “prepared for the purpose of regulating development in Bermuda...and to effectively manage Bermuda’s natural and built environment, resources and development in a sustainable way which best provides for the environmental, economic and social needs of the community”. Further, plans approved by the DAB are “enforceable”. In most instances this means that developers who do not build in accordance with approved plans can be prosecuted or otherwise required by law to adhere to the approved plans. Accordingly, the Bermuda Plan must be considered as both policy and regulation in order to assure the public of certainty with respect to development rules and evenhandedness with respect to the DAB’s decisions.

The DPA established the DAB to review and determine applications to subdivide and develop land that is zoned for development. The DAB is guided by each extant Development Plan. Each successive plan has focused more and more on how to ensure greater, not less, protection of our remaining open and conservation areas. The 2008 Bermuda Plan states:

“the environmental objectives and policies of this Plan reflect and complement the goals and recommendations of other Government environmental initiatives including the Environment Charter, Sustainable Development Strategy and Implementation Plan, Biodiversity Strategy and Action Plan. The valuable information collected as part of these and other initiatives will be used to ensure sound decision-making regarding development proposals... Plans of subdivision must conform to the zoning requirements of the land to which they relate and significant environmental features on the site should be retained.”

Further, in determining applications, the DAB must have regard to any relevant considerations:

“it is important that the DAB has all the pertinent information relating to a proposed development in order to determine a planning application and to ensure that a development does not have an adverse impact on the natural, human or built environments of a site or its surrounding area...An environmental impact assessment of a project helps to determine any potential problems or risks associated with a development at the design stage. It also enables informed decisions to be made about whether a development should be permitted and what planning conditions are necessary in order to control the design, enhance the benefits of the scheme, and avoid or mitigate any adverse effects.”

Accordingly, under s. 3 and the First Schedule of the DPA, the DAB may require the submission of an EIS (which should include the results of the EIA) for:

- major development proposals (determined by the use, scale, density and magnitude of potential impact)
- developments which are proposed in particularly sensitive locations
- developments which involve complex and potentially adverse environmental effects.

Even before an application is submitted to the DAB, technical officers within Planning tend to consult with the Department of Conservation Services when it appears that development applications are made for land that include or may impact on neighbouring protected lands. This consultation would often trigger the recommendation to the DAB that an EIA/EIS is warranted. Planning, in response to objectors during

DEPARTMENT OF PLANNING GUIDANCE NOTE 106

To supplement the DAB's discretion to require an EIA/EIS, Planning created a comprehensive 16 page Environmental Impact Assessment and Environmental Impact Statement Guidance Note 106 (“GN 106”) dated November 2010 to assist developers and property owners by providing all necessary information for projects which require an EIA and an EIS.

GN 106 states that the EIA process helps to ensure that the implications of the predicted effects, and the scope for reducing them, are properly understood by technical officers in Planning, the DAB, the general public and other stakeholders prior to the determination of a planning application or proposed subdivision. The EIA/EIS for proposed development is intended to be submitted with the initial planning application or as early as possible in the process to inform and

assist the DAB to determine whether the development should be permitted.

GN 106 sets out the 8 main steps (consistent with international best practices) for a proper EIA/EIS process. However, GN106 applies only to determinations of development applications by the DAB – which can consider only those applications regulated by the zoning and standards set out in the Bermuda Plan and the DPA. SDO applications that would change or lift conservation zoning are therefore beyond the jurisdiction of the DAB.

However, the TP SDO stipulates that certain reserved matters are to be submitted to the DAB. Accordingly, it appears that, under Bermuda's international obligations and in accordance with binding common law, the DAB must require a comprehensive EIA including a public consultation component, before it can consider whether or not to approve the reserved matters.

consultation on the 2008 Draft Plan, noted that the Draft Plan indicated *“The definition of ‘major’ is not restricted to large scale developments only. The policy is written to be flexible enough to include any type of development that is deemed to have a potential impact on the environment.”*

To date, the decision of the DAB to require an EIA/EIS is viewed as discretionary. I find that this is a mistake of Bermuda’s international commitment under the UK Charter and the Rio Declaration, both of which have mandatory language for the requirement of EIA/EIS prior to approval of applications that are “major” or “likely to have significant adverse impact on the environment”.

DEVELOPMENT PLANS – A HISTORY

Prior to 1965, permission to develop land was granted through individual zoning orders (to individuals and designated areas) by Acts of Parliament. The 1952 Jennings Land Zoning Order, for example, is a survivor of that regime. A British planner (H. Thornley Dyer) living in Bermuda proposed that land use could be regulated better through a planning statute. He mapped out various uses of land (cottage colonies, commercial, residential) and the 1965 Development and Planning Act was promulgated for the “orderly and progressive development of land and to preserve and improve the amenities thereof.” By 1968 a blueprint for land use – Bermuda ~ the Next 20 Years – was developed. The public had an opportunity to view and object to this Plan, although it appeared that many people did not truly understand what this new regulatory regime was about or how it would affect their use of their property.

1974 ushered in a more modern and comprehensive Development and Planning Act which still remains basically the same (with some amendments). The day after the Act was passed, the 1974 Development Plan – Which Way Bermuda? – was issued. Implementation of the DPA is guided by the Plan which regulates the details of development and sets out reasonable expectations about what kind of development will be approved or not. Significantly, as comprehensive as the DPA and Plan were, there was a recognition that they might not address or provide for every possible scenario that would fuel development for the next decade.

The primary purpose of the 1974 Plan was to set out zones designating what kind of development can be built where as well as set out policies and standards to regulate how development should be done. Plans are created, not just by technical officers and experts, but also with public input. Effectively, Plans articulate our collective values and aspirations regarding land use in Bermuda. In addition to local plans (e.g. for Hamilton, Flatts and Dockyard), the series of national Development Plans (1974, 1983, 1992 and 2008) reflects the evolution of and changes in our national priorities over time.

Work on the 1974 plan began in 1970 and entailed a fair amount of public input with a questionnaire and public meetings in St. George’s, Somerset

and Hamilton. This Plan established a baseline survey of what development then existed in Bermuda. Its primary goal was to determine how to regulate land use, not how to preserve land. Specifically, the 1974 Plan introduced an application process for all new subdivisions. It was recognized, nevertheless, that some areas needed to be protected from development in the national interest. Therefore, approximately 30% of undeveloped land was identified to be set aside (and not receive permission for development) pending further study.

That study began in 1976 with technical officers from the Departments of Agriculture and Planning literally walking on almost every square mile of the island to gather details of the physical features and existing use. Areas with a development density of greater than three houses per acre were deemed to have too little open space value and were excluded from the survey. Thus only open space blocks of approximately half an acre or more were classified on the basis of their dominant characteristic, i.e. woodland, arable, open space or other. Of the 12,000 acres that comprise Bermuda, some 1,500 acres were recommended to be carved out for protection against development into perpetuity. Accordingly, the next plan was intended not only to govern how land would be developed, but also what land would be protected.

Further to s. 28 of the DPA, the 1983 Plan included an Environmental Conservation Areas Plan that designated three new zones: agriculture, woodland preservation and open space/recreational. Approximately 500 acres for each zone were set aside to be protected against development. Based on the environmental features, some of these lands overlaid private property. Accordingly, the public consultation process entailed not only public meetings but also a period of intense objections, negotiations and compromises which whittled away a percentage of the protection recommended – thus undermining the purpose of the protected zoning from the very start. On land designated as arable or nature reserve, for example, property owners were usually and fairly allowed to carve out a portion to build primary family homes.

As the 1983 Plan and public consultation envisioned that these 1,500 acres (just over 10% of Bermuda) would be protected forever, there are no guidelines on how these lands would be treated if the protection was ever lifted. When a

“Where it is possible to lose a species that will be irreplaceable, then the highest possible standard of protection should apply.”

(Bermuda Resident)

“If a proposed development is so materially important to the country then it is only right that the process by which they are granted be adequate and thorough so as to weigh something so vital.”

(Bermuda Resident)

SDO lifts protection the presumption is that the land reverts to Residential II (less dense than Residential I) zoning density. However, there has not been public consultation on whether the conditions should be more stringent than Residential II zoning, given the fact that there were special environmental reasons for the land to be protected in the first place.

The 1992 Plan – The Changing Face of Bermuda – was intended to tighten up regulations. This Plan involved the public in an unprecedented level of consultation. There was an exhibit at City Hall that stitched together large aerial photographs to show the extent to which Bermuda had been developed. It was estimated that over 1/6 of the population of Bermuda visited the exhibit. There were over 1,200 responses to a questionnaire soliciting views on the Draft Plan. This gave the Ministry a level of confidence that the policies that ended up in the Plan had broad public support.

The Plan also aimed at connecting the open spaces identified in the 1983 Plan as much as possible in order to achieve some continuity of the green spaces. There was a growing recognition that a continuous band of green provides a more suitable ecosystem than fragmented, isolated parcels punctuated with concrete. One of the primary reasons for protecting woodland and agricultural land was the visual amenity reason – that is, preserving the “Bermuda image”. However the more critical value was to preserve and improve the ecological quality of Bermuda’s remaining open and nature spaces. This Plan required that cave studies be conducted before development could proceed.

For the 2008 Draft Bermuda Plan the statutory consultation period of two months for the public to review was extended to four months. During this period, the

public could access the Draft Plan, not only at Planning but also at post offices, libraries and a series of public exhibits. The public then could make objections for consideration at a public inquiry before the Objections Tribunal. The 2008 Plan incorporated and superseded a number of local plans but otherwise did not change the 1992 zonings significantly. One important zone classification was added: protection for Coastal Reserve.

The overall goal of the 2008 Plan (which will guide development in Bermuda until 2015) is to balance appropriate development with the need to conserve and protect natural areas for future generations. In doing so, the Plan encourages development in existing developed areas (brownfields) rather than expanding the environmental footprint. The Plan also encourages new development to incorporate energy efficiency, water conservation and other sustainable design measures. Accordingly, consideration would be given to permitting greater densities and higher buildings in already developed areas that would utilize existing transport and commercial services. Increasing density (or, “urbanization”) is a way of taking pressure off of green areas. While often criticized as “town cramming rather than town planning”, this approach is reasonable in an island with finite space. Bermuda does not have the luxury of a large percentage of undeveloped land and must therefore take a more restrictive approach than other jurisdictions.

Just as there are mechanisms for public consultation to develop Plans as well as to comment on specific development applications within the jurisdiction of the DAB, there should equally be a clear and consistent procedure for applications for SDOs. The Plans have been too carefully developed to be deviated from without considerable public input.

8: SPECIAL DEVELOPMENT ORDERS

The DPA and 1974 Plan were intended to operate in concert with each other. It was recognized that, however comprehensive these seminal documents were, they might not account for every possible scenario. Therefore, s.15 of the DPA was intended to give authority to the Minister to grant general orders (applicable to all land) and special orders (applicable to specified land) in order to address those situations which the DPA and 1974 Plan did not include or foresee.

The first SDOs were granted for national projects of obvious direct and broad benefit to all inhabitants of Bermuda such as the Tynes Bay Incineration Plant and the Bermuda College (notwithstanding their controversial locations). Other early SDOs grandfathered or otherwise settled outstanding subdivision issues (see Appendix II for SDOs granted since 1978). The law has not changed much but the administration and interpretation of the law has. Over the years SDOs have come to be used to facilitate private development that may be contrary to the DPA or zoning but were deemed to be in the national interest because the developments would contribute generally to Bermuda. There is no statutory impediment to granting SDOs to private developers who may wish or need setback encroachment or the lifting of zoning, density or industry restrictions. In other instances, SDOs were used to unravel what some have criticized as an unnecessarily protracted and unwieldy planning application process. Thus, the use of SDOs has evolved from national *projects* to national *priorities*.

In the DAB process for normal applications, the purpose of the EIA is to enable the DAB to determine not only how (under what conditions) development can be carried out, but whether the development should take place at all. If it is important for the DAB to have all pertinent information for developments that may have adverse impacts on the environment, then it is clearly no less essential for decision-makers to have all pertinent information related to a proposed development that will definitely have adverse impacts on the environment by virtue of removing conservation zoning. It stands to reason that EIA/EIS is even more critical for SDO applications. This is not to imply that there have been no EIAs/EIS' for past SDOs. EIAs and or EIS' were submitted for 13 of the 57 SDOs granted since 1978. Belco, for example, typically prepares comprehensive EIAs for each phase of its proposed developments. Indeed, an extensive EIA was conducted for the 1995 TP SDO and an EIS was submitted for the 2001 TP SDOs.

“The Equator Principles have been effective in ensuring that large projects are developed and operate in accordance with international good practice in relation to environmental and social issues.”

(HSBC Holdings Sustainability Report 2010 [See Appendix V])

LEGAL STATUS OF A SDO

Section 15 of the DPA (the principal legislation) provides for the grant of a SDO (subordinate legislation). An Order (defined by the Interpretation Act 1951) is one type of “Statutory Instrument”. With few exceptions, Statutory Instruments must be passed by the Legislature (House of Assembly and Senate). Passage by the Legislature may be by either the negative or affirmative resolution procedures. The negative resolution procedure requires that an Order is laid before the House of Assembly and Senate and automatically becomes law if there are no objections to it. The affirmative resolution procedure means that an Order becomes law only by a vote of the House of Assembly and Senate (usually after open debate).

When Statutory Instruments are authorized to be made by a principal Act but that Act is silent on whether the negative or affirmative resolution procedure

is to be used, then by default, the affirmative resolution procedure applies. It appears that since 1978, 48 SDOs are recorded as having been passed by the negative resolution procedure of the Legislature. The remaining 9 SDOs do not appear to have been laid before the Legislature. These were merely notified to the public as General Notices in the Official Gazette.

The 2011 amendment to the DPA ensures that there will be no future confusion or lapses – SDOs must be passed by the affirmative resolution procedure from now on. The amendment also deems that all prior SDOs were properly passed.

Whatever the parliamentary procedure, a SDO has the status of legislation. However, it is legislation which is subordinate to the principal legislation – the DPA. A principal Act of the Legislature cannot be judicially reviewed. However, subordinate legislation, such as a SDO, can be judicially reviewed.

Moreover, SDOs were not originally designed to by-pass a public participation process. There is evidence that a few of the early SDOs did involve public consultation prior to approval by the Minister. For example, there was public consultation for the 1997 Equestrian Centre SDO, the 1999 Berkeley Institute SDO, the 1995 TP SDO (a two week consultation period) and the proposed Southlands SDO (put in the public arena in draft form). However, direct public consultation is not a requirement.

The view from the MEPIS was that the process that emerged for the 2011 TP SDO was adequate:

- “• *developer made a case to Cabinet to have a SDO granted*
- *there was wide-ranging consideration by Cabinet to determine whether or not there is a national interest involved*
- *followed by an assessment of the pros and cons associated with the proposal against the benchmark of national interest; and consideration of the impact of the proposal on Bermuda’s environmental, social, and economic sustainability (by civil servants and Cabinet?)*
- *an analysis by technical officers of conditions that should be attached to an order*
- *should a decision be taken to grant it, consideration by Cabinet of technical officer’s recommendations regarding conditions*
- *a decision by Cabinet to grant or not grant the requested Order*
- *finalization of the technical considerations involved in drafting the order*
- *passage through the legislative process via parliamentary and public scrutiny.”*

Unfortunately, this process as described does not ensure independent assessments or adequate time and clear steps for direct public input prior to the decision to grant the SDO ‘in principle’. Beyond the pros and cons and consideration of the environmental impact, there should also be a real and robust assessment of possible alternatives to the proposal and how to mitigate risks. Without a comprehensive EIA, the conditions recommended by technical officers to be attached to the SDO are likely to be incomplete and not informed by all necessary expertise, especially if done within a too tight timeframe. Passage through the legislative process by way of parliamentary and public scrutiny should have the benefit of full disclosure, including adequate explanations of risks, mitigation and why alternatives are not feasible.

In any event, given that the conservation zoning and Development Plans were created with substantial public input, it is reasonable to expect that such zoning will be removed only with an equivalent measure and form of public consultation and expert input.

Since 1978, 57 SDOs have been granted of which 26 were for hotel or guest house development. Of these 26 SDOs, eleven involved clear zoning encroachment. The very first 1978 SDO for the national project of building the Bermuda College was a “Special Planning Provision Act” passed by the Legislature under the affirmative resolution procedure. This entailed the purchase of four parcels of land. The first was

“It’s never a one time request – always a string of more and more and more.”

(Caribbean Official)

GENERAL DEVELOPMENT ORDERS (“GDO”)

GDOs provide for certain forms of development that do not need to be approved by the DAB. Although developers do not need to make full planning applications, they must still apply for “Permitted Development Permits”. These applications (which may be granted within a week and often within 24 hours) are reviewed for construction details and building code compliance

by the technical officers in Planning. Once approved, there is no need to seek a separate building permit. The 1975 GDO provided for development without DAB approval for internal renovations and the erection of fences no more than four feet tall. The 1999 GDO allows for minor construction without DAB approval such as barbeques and erection of satellite dishes and solar energy systems.

about 20 acres of virgin land extending from the coastline. The remaining lots contained small cottages and one had a small amount of farmland (near the main road). The Act was necessitated by the huge outcry and petition (mostly by neighbours) against the move of the College from Prospect to Stonington. The 2008 Coco Reef SDO for the same property also allowed some encroachment into woodland and coastline. No environmental assessment was done. There was considerable public objection to the 1984 Tynes Bay Special Planning Provision (in an already highly populated area). The 1989 Mt. Langton SDO and the 2002 and 2004 Belmont SDOs facilitated changes in use and higher density development than the Development Plan allowed. Public objections to the 1997 Equestrian Centre led to some mitigation of the scale and view of the project. The 1999 Elbow Beach and 2003 Sonesta SDO proposals (the latter did not materialize) entailed minimum encroachment on protected hillsides that were overlaid with tourism zoning. The 1999 Daniel's Head (9 Beaches) SDO allowed non-traditional building construction methods and materials with minor encroachment on the coastline.



BERMUDA KARST ROCK (indicating the presence of caves)



BERMUDA BELMONT LIMESTONE (in layers)

9: THE TUCKER'S POINT SITE

It is the TP SDOs of 1995, 2001 and 2011 that have attracted particular public concern because of the cumulative large scale of encroachment on lands that are either protected or of environmental importance. During the public consultation for the 2008 Bermuda Plan, TP objected to only three relatively minor zoning restrictions. The company requested that the Tribunal Appointed to Hear Objections to the Draft Bermuda Plan 2008: (a) amend Recreation zoning to Tourism for an area of 2.15 acres that was already used for a parking lot and physical plant; (b) remove proposed Woodland Reserve conservation zoning for a small area that was devoid of trees and already partially developed; and (c) remove Coastal Reserve zoning from 1.24 acres on Harrington Sound Road. TP had the opportunity to object to the conservation zoning of Paynter's Hill and Quarry Hill at that time, but did not do so. Forced by financial pressures some three years later, TP applied for a SDO that could irreversibly destroy those protected hills. This came as a shock to certain members of the public. Their concern and ensuing opposition were due, in large part, to the unique nature of the Tucker's Point site.

"Paynter's Hill is the Yellowstone National Park of Bermuda, in many ways."

(Dr. David Wingate, Bermudian Naturalist, helped to rediscover the Cahow [Bermuda Petrel] in Bermuda and the Black-Capped Petrel in Haiti)

"We tend to concentrate on the larger species but ecosystems usually entail symbiotic relationships of large species with very small life forms (such as algae and viruses). We don't know what else could be lost (such as future medicines) when we destroy the larger forms."

(Bermuda Official)

KEY TERMS

Endemic – Species found only in Bermuda and nowhere else. They arrived here naturally without the aid of humans and have adapted over time to become genetically different from related species elsewhere. Most of the species extinctions in the world have occurred to island endemics because, having evolved in relative isolation, they are more vulnerable to mainland diseases and predators and cannot compete with faster growing invasive species. It is estimated that some two-thirds of endemics inhabit marine caves that cannot be accessed.

Native – Species which also arrived in Bermuda without the aid of humans (through current, wind or birds). They are found in other countries, and are genetically the same as in Bermuda.

Introduced – Species which would not have made it to Bermuda on their own, but have been brought here by humans. These species may have been introduced accidentally, or brought here for economic or ornamental reasons, or to serve as a biological control.

Invasive – Introduced species which adapt so well to the local conditions

(often because their natural predators do not exist in Bermuda) that they become a threat to the endemic and native species by preying on them, taking over their nests, or just over-growing them.

Biodiversity – the variety of life forms, encompassing the variations that occur both within and between species. This variety is critical to preserving the quality of life on earth.

Ecosystem – encompasses all the plants and animals in a given area together with their physical surroundings and all the interactions between them. The removal of one component can cause the system to crash or become permanently altered.

Habitat – a locality (terrestrial and marine) where a species lives. Ecosystems usually comprise many habitats. Generally, the key to protecting a species is to protect its habitats. Careful biodiversity conservation must aim to protect an adequate representation of habitats to accommodate healthy populations of endemic and native species.

From *State of the Environment Report 2005* Ministry of the Environment

Our 21 square mile island home in the middle of the North Atlantic Ocean holds surprising interest for international scientists. Bermuda has the most northerly coral reef in the world and houses some of the most northerly salt water mangroves in this hemisphere. The 1992 Bermuda Plan records 539 acres of fragmented terrestrial areas to be protected as nature reserves. This equates to just over 4% of Bermuda's public and private land area which is set aside strictly for the protection of flora and fauna. Approximately 5% of additional open space – national parks and Bermuda National Trust open spaces – is also protected, but these acres cater to recreational needs as well. The nature reserve lands of Tucker's Point along with the nearby Walsingham property are of particular importance. They comprise the most environmentally sensitive and biodiverse corner of Bermuda. In contrast, the 40 acres of Spittal Pond – although large and biodiverse – are more exposed to degradation by hurricanes, and are not totally virgin land. Similarly, the 77 acres of Cooper's Island returned to Bermuda from the former US airbase, are being rehabilitated but are not as biodiverse as Tucker's Point, and certainly not as pristine.

Tucker's Point has a high degree of complexity due to the various ecosystems: caves; coral reefs; mangroves; and forests. The area is not only an important habitat for domestic and migratory birds, but also boasts a wide variety of endemic and native flora and fauna. Some of these species are just now being identified as having global scientific significance. Overhanging rocks and sinkholes unique to the area favour the growth of indigenous plant species such as endemic Peperomia and Bermuda Bean that are not found anywhere else on the island. The area is also home to the rare Killifish and Diamondback Terrapin. The story of the Bermuda Yellowwood tree is startling – there are only 21 left in Bermuda in their original location with their natural ground cover. If we do not manage their conservation well, they could become extinct before our eyes.

DIAMONDBACK TERRAPIN

The Diamondback Terrapin is a small turtle with elaborate shell patterns resembling cut diamonds, spotted skin and a mouth that curves upward in an ever-present smile. The Diamondback Terrapin inhabits salt marshes and estuaries along the Atlantic coast of the United States and the land-locked brackish ponds in the Tucker's Point and Mid Ocean golf courses: Mangrove Lake, North Pond, South Pond and Trott's Pond. They are believed to be the only wild breeding population outside of the United States.

Approximately 100 adults currently exist on the island, making them extremely vulnerable to local extinction. Adult females are known to nest in sand bunkers, which act as surrogate beaches, on the Mid Ocean golf course. Nesting occurs between March and August, and hatchlings begin to emerge in July. The average clutch size is 5 eggs per nest and the hatching success rate within the Bermuda population is alarmingly low (approximately 20%). It is unknown why the success rate is low, but studies are currently being conducted in an effort to determine why.

The Diamondback Terrapin is classified as a native species in Bermuda (unlike the more commonly encountered red eared slider, which was first introduced to the island as a pet some decades ago). A recent carbon-dating analysis of a Diamondback Terrapin fossil from the Bermuda National History Museum dates back to the 1500s (prior to the first human settlers). Diamondback Terrapins are considered to be the second naturally occurring non-marine reptile that still survives in Bermuda – the other being the endemic skink.

Diamondback Terrapins are globally listed as a "Near Threatened Species"

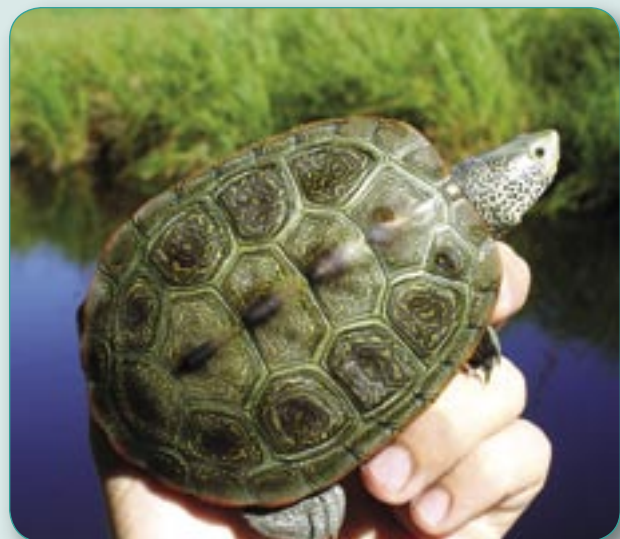


Photo: Mark Overbridge

Adult male Diamondback Terrapin

by the **International Union for Conservation of Nature Red List of Threatened Species**. On the east coast of the United States (where the species is endemic) their status, which varies from state to state, ranges from endangered to a species of special concern. Massive over-harvesting for food consumption in the late 19th and early 20th centuries led to huge declines in the North American populations, which continue to be affected by habitat loss, predation, crab trapping activities and commercial harvest for human consumption. Protection of this species in Bermuda, therefore, is a matter of global importance. However, there are no specific conservation measures currently in place for them here.

WHAT'S THE BIG DEAL ABOUT THE YELLOWWOOD TREE?

In some ways, the Bermuda Yellowwood has become the symbol of the controversy over the TP SDO. Many of us first became aware of this tree only then. There is a view that tree-huggers have exaggerated the importance of this species. There are only 21 "relic" Yellowwood trees in existence in Bermuda. "Relic" means that they are the remaining survivors in the same location as original trees that have been on the island since long before humans arrived. They may also be endemic to Bermuda (to be confirmed by DNA tests) – i.e. they exist in the wild (not propagated by humans) and have genetically become different from Yellowwoods found elsewhere in the world. Two of the 21 trees are located in Walsingham and 19 are at Tucker's Point.



The Yellowwood canopy

Yellowwoods are more at risk than even the Bermuda Cedars and the ancient Olivewood forest found at Tucker's Point. Each Yellowwood tree has either male or female flowers. One of each tree is needed in order to reproduce. In Walsingham, both trees are female. This site is not viable – no new Yellowwoods will grow there without artificial pollination. Of the 19 Yellowwoods at Tucker's Point, 8 are female. Therefore between the two sites, there are 10 remaining mature female trees able to produce seeds. Unfortunately, that means that the gene pool of this original stand of trees is very limited – but at least there is a possibility of natural reproduction.

The gene pool is not the only problem. Yellowwoods are excruciatingly slow-growing. Until they are about 40 years old, they are like children – extremely vulnerable to aphids, other insects and winds. Since the 1960s Government

has been collecting seeds from the trees and propagating them at the Tulo Valley nursery. In 1970, to commemorate the 350th Anniversary of Bermuda's Parliament, over 1,000 plants were given away to the public. Some years later a competition was held to find out which had grown the largest – but only three trees could be found still surviving. (You read it right – 3 out of 1,000!).

So how have the relic Yellowwoods managed to survive? Once they reach maturity at about 40 years old, they are described as one of the toughest trees anywhere – able to withstand hurricanes and other natural threats. Elsewhere in Bermuda, they have not managed to survive development. Walsingham and Tucker's Point host all that is left of the original stands of Yellowwood trees.

The Yellowwoods at Tucker's Point also grow in a patch of woodland that includes many other rare native and endemic plant species – some of which are critically endangered in their own right. These include: Bermuda Cedar, Bermuda Palmetto Palm, Bermuda Olivewood, Southern Hackberry, Forestiera, White Stopper, Bermuda Snowberry, Doc Bush, Sword Fern, Long-leaved Spleenwort, Lamark's Trema and Wild Coffee Shrub (these latter two species could not be found during the last survey of the site). The small sink just north of the Yellowwood stand contains Toothed Spleenwort, Bermuda Cave Fern and Bermuda Shield Fern which are all protected species.

The dangers of development include: removal of surrounding protective trees and woodland (which protect the Yellowwoods from hurricane damage and winter gales at their exposed location); excavation or rock cuts (that, in addition to damaging root systems, can also cause drying out of sub-surface moisture that sustains the trees in dry periods); and, accidental damage from survey lines, construction equipment and workers.



Ground cover at the base of Yellowwood trees

Although the species can be saved by propagation in nurseries, the last stand of Yellowwoods at Tucker's Point cannot be recreated – as the ground cover at the base of the trees plays an integral part in the pristine integrity of this species. Bermuda Yellowwoods are included in the global **International Union for the Conservation of Nature Red List of Threatened Species** as 'Vulnerable' to extinction. In Bermuda they are considered 'Critically Endangered'; however, we have no specific conservation plan for the Yellowwoods.

According to the Biodiversity Convention “the unique characteristics that make island biodiversity so special also leave it particularly fragile and vulnerable. Despite the high levels of biodiversity and the prevalence of endemism, island species are present in relatively small numbers, making them very vulnerable to extinction...As a result, many island species have become rare or threatened, and islands have a disproportionate number of recorded species extinctions when compared to continental systems. Of the 724 recorded animal extinctions in the last 400 years, about half were of island species. At least 90% of the bird species that have become extinct in that period were island-dwellers.”

The vulnerability of Small Island Developing States – there are 49 states classified – due to environmental fragmentation and the resulting loss of biodiversity and ecosystem integrity is of increasing and particular concern among UN agencies and others studying the impacts of biodiversity loss, climate change, and other environmental impacts. A July 2010 study on *Biodiversity Indicators, Economic Services and Local*

“Bermuda may be the first place in the world to reach its absolute limit of development – we have the highest density and lowest protected space; lowest natural financial resources.”

(Bermuda Official)

FRAGMENTATION

Trees act as the lungs for the earth, each one producing enough oxygen daily for one person's needs. Each tree in Bermuda is estimated to provide services worth \$17,000 per year. Trees survive more easily in forests where their roots can grow together. and merit protection for their value as forest habitat for other flora and fauna. The edge of a forest takes the brunt of damage from storms and predators such as crows, rats and feral cats. In the interior, which is protected, trees are bigger and stronger. There are certain birds and other species that must be deeply nested and cannot live on the edges exposed to open space.

Forests that share a high proportion of their borders with anthropogenic uses (urban or agriculture) are at higher risk of further degradation than forests that share a high proportion of their borders with non-forest, natural land cover (wetland, grassland or shrubs). The impact of development does not stop at the boundary. There is usually a “dieback” (or setback) area for forests which must adjust, in the face of adjacent development, to new exposure for wind and soil erosion. Moreover, once woodland is cut down, it rarely grows back to its pristine state because aggressive invasive species tend to take over. It is not only trees and animal habitats that are threatened by development, but also supporting habitat features, such as ground cover, that will lose optimal growth conditions and protection from wind and salt spray. Without blocks of natural forest insect populations become destabilized and pests get out of control.

The problem with lopping off hilltops (as was done for the Ship's Hill lots at Tucker's Point and proposed for Paynter's and Catchment Hills) is not merely a problem of reduced acreage. The problem is fragmentation – the process of breaking up large patches of forest into smaller pieces. Fragmentation is an important cause of species extinction – small fragments of habitat can support only small populations of plants and animals. Small populations are

more vulnerable to extinction. While green spaces may remain dotted amongst the concrete, these spaces often cannot provide the effective habitat that a continuous forest would have done. This is particularly alarming when the forest is small in the first place.



Fragmentation after the hilltop is removed at Ship's Hill

While there is some debate about whether it is larger blocks of habitat or rather habitat diversity that are more effective in supporting more species, it is generally accepted that larger continuous areas do better than several smaller blocks. For example, a contiguous area of forest of 40 acres logically provides more space for birds and other species to migrate inward during storms than two 20 acre areas. Ten acres is considered to be the minimum “carrying capacity” for habitat conservation protection. To ensure the survival of the island's plants and birds, it is estimated that Bermuda's woodland must be kept to more than 500 acres. Not all species of flora and fauna respond exactly the same way to fragmentation. Therefore, an EIA would be able to assess the effect of fragmentation on the variety of species at Tucker's Point. An EIA would also indicate whether and where the creation of habitat corridors could mitigate the effect of development in that area.

Livelihoods in Small Island Developing States highlighted not only the vulnerability of small islands, but indeed their important role as advance indicators of biodiversity change and the human consequences of that change (see Appendix III).

Unlike Cayman and the BVI (2 other OTs), Bermuda is not a signatory to the Biodiversity Convention. We have signed on to the 1979 Convention on Migratory Species (“CMS”) and the 1999 Ramsar Convention on Wetlands (“Ramsar”). These place additional obligations on Bermuda beyond the UK Charter. The island is an important feeding station and refuge along the North-South Atlantic flyway for migratory birds and Bermuda has committed to protect both birds and habitats. The rediscovery of and recovery program for the Cahow (Bermuda Petrel) is world-renowned and has become a global symbol of hope for nature conservation. But we cannot rest on our laurels. As a signatory to the CMS, Bermuda is also expected to commit to specific actions to protect the habitats of other migratory birds. Ramsar establishes a *List of Wetlands of International Importance*. Of the 16 wetlands listed for all of the UK’s OTs, eight are in Bermuda– none as yet at TP – (see Appendix IV). Each country is expected to add to the original listing and also to protect unlisted wetlands as needed.

Increasing scientific evidence and awareness of the value of the environment has brought a new global resolve to protect endangered species from the threat of extinction. The loss of one species will affect the survival of others. Habitat destruction, due often to pollution,

THE CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES

Bermuda became a signatory to the 1979 Convention on the Conservation of Migratory Species of Wild Animals in 1985 through the extension of the CMS by the UK to the Overseas Territories. The CMS aims to conserve endangered and vulnerable migratory species worldwide by prohibiting their capture or killing; removing barriers to migration; and protecting habitats.



Shorebird migration flyways – northern hemisphere

A “migratory species” is defined as any species with a significant proportion of its members cyclically and predictably crossing one or more national boundaries. Migratory species are important from a climate impact assessment perspective as they act as linkages between ecosystems, and are good early indicators of ecosystem change. Migratory birds are the most visible group of migratory species as they often fly long distances in order to escape cold climates or change feeding grounds. Most species of birds travel annually in distinct routes (“flyways”).

Bermuda is the most northerly stop along the North-South Atlantic flyway for

species travelling south for the winter. Birds are such precise navigators that there is evidence that each year repeat visitors are not only able to find Bermuda in the middle of the Atlantic Ocean, but are even known to alight in the same patch of trees within a one square kilometer area. In addition to annual visitors, Bermuda hosts birds caught in storms. After the hurricanes that battered and skirted the US East Coast in 2011 a number of unusual species converged on Bermuda where they foraged before continuing south. Some of these storm refugees will return as annual visitors. Thus, Bermuda operates as both a “pit-stop” and as an “emergency landing strip”.

The Tucker’s Point area, as the largest remaining forest with the greatest diversity of insects and other food sources, is a critical bird habitat. In much of Bermuda, hillsides have been developed. The still undeveloped hills at Tucker’s Point, especially Paynter’s Hill, provide a more ideal habitat – with enough room for species that cannot survive well on the edge of forests and need to forage inside thick brush. The hills also provide sanctuary from high winds – when winds come from one direction, the species logically move to take shelter on the other side. This is not feasible when the hills become “fragmented”. Even when a band of green remains on the hillsides, the lopping off of the hilltops effectively impairs the value of the habitat.

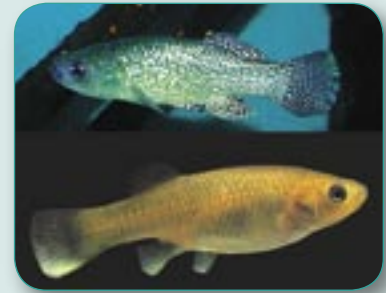
The first obligation of countries signed on to the CMS is to list endangered species that are either threatened with extinction or that would benefit from global cooperation to conserve. The Cahow is listed as an endangered species. Notwithstanding our commitment to protect habitats for migratory birds, we have not entered into any sub-agreements tailored to the conservation needs of our role in the North-South Atlantic flyway. We are obliged under the CMS to consider (and review any available science on) whether proposed development could damage critical habitats of migratory species as well.

overexploitation and invasion of nonnative species, is the single greatest threat to species around the world and is the main cause for biodiversity losses. One reason that nations agree to protect the environment is the understanding that the world is intricately interconnected. Pristine habitats and unique species in one corner of the world have not only local significance, but also global value. This is articulated well by the principle of the Common Heritage of Humanity which holds that defined territorial areas and elements of humanity's common heritage (cultural, built and natural) should be held in trust for future generations and be protected from exploitation by nations and corporations. As stated in the 1997 UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations (which potentially will become international customary law: meaning that it will be binding on Bermuda, whether we sign on to it or not):

The present generations have the responsibility to bequeath to future generations – an Earth which will not one day be irreversibly damaged by human activity. Each generation inheriting the Earth temporarily should take care to use natural resources reasonably and ensure that life is not prejudiced by harmful modifications of the ecosystems and that scientific and technological progress in all fields does not harm life on Earth.

KILLIFISH

The two species of Killifish found in Bermuda are listed as a protected species in the **Bermuda Protected Species Act 2003** (of the 433 species of fish recorded in Bermuda, only eight are currently recognized as valid endemic species). Historical records indicate that Killifish were once abundant and widespread throughout many of the marshes and ponds of Bermuda, as well as the muddy bays around St. George's and St. David's in the mid 1800s and early 1900s. Today they are found only in nine small, isolated ponds (in three of which the populations are sufficiently low enough to be deemed vulnerable to extinction). Mangrove Pond and Trott's Pond in the Tucker's Point area boast two of the three largest populations of Killifish in Bermuda.



Male (top) and female (bottom) Killifish

RAMSAR CONVENTION ON WETLANDS

Bermuda became a signatory to the Ramsar Convention on Wetlands in 1999 through the UK. The Ramsar Convention is a multilateral treaty that provides the framework for national action and international cooperation for the conservation and wise use of wetlands. It was developed in 1971 in Ramsar, Iran with 160 contracting parties who have committed to implementing the "three pillars" of the Convention:

- to designate suitable wetlands for the List of Wetlands of International Importance ("Ramsar List") and ensure their effective management
- to work towards the wise use of all wetlands through national land-use planning, appropriate policies and legislation, management actions, and public education and
- to cooperate internationally concerning transboundary wetlands, shared wetland systems, shared species, and development projects that may affect wetlands.

According to some estimates, wetlands cover at least 6% of the Earth's land surface, and contribute significantly to the global economy in terms of water

supply, fisheries, agriculture, forestry, and tourism. The Ramsar Convention seeks to protect a wide array of wetlands including lakes and rivers, swamps and marshes, wet grasslands and peatlands, oases, estuaries, deltas and tidal flats, near-shore marine areas, mangroves and coral reefs, and human-made sites such as fish ponds, rice paddies, reservoirs, and salt pans.

Immediately upon signing onto the Convention, the first obligation for countries is to "list" wetlands. In Bermuda our underwater caves, coral reefs, mangrove lakes and ponds constitute the bulk of our wetlands. Seven of Bermuda's wetlands on public lands were listed in 1999. Although the Convention contemplated that countries will add to the list periodically, Bermuda has made no additions since the original listing. Wetlands on private property may be listed.

In 1989 the International Union for the Conservation of Nature declared that mangrove forests are the most threatened ecosystem in the world (State of the Environment Report). Two of the five ponds in the Tucker's Point / Mid-Ocean Golf Club area – Mangrove and Trott – are considered to be good candidates for listing as they are inland, somewhat protected from hurricanes and therefore boast healthy mangroves.

BERMUDA'S ANCIENT CAVES

Bermuda has one of the greatest concentrations of caves per square mile in the world. Most of the 150 known limestone caves are located in the Walsingham / Tucker's Point area. This strip of land (totalling approximately 1/24th of Bermuda) is described as a "relic" of undisturbed landscape. Because it has been relatively inaccessible and undeveloped since the time of human habitation, it has maintained its integrity as a reservoir of biodiversity.

By comparison, two of our well-known nature reserves have been far more affected by natural and human threats over the years: Cooper's Island (not as biodiverse; younger rock; farmed prior to NASA) and Spittal Pond (more vulnerable to hurricanes; impacted by the neighbouring dairy farm).

Caves constitute one of the rarest and most fragile environments on earth with unique flora, fauna and delicate speleothems (secondary mineral deposit formed in a cave such as stalactites and stalagmites). Pools in Bermuda caves are defined as anchialine (partially or totally submerged in coastal areas) and are connected to the sea via tidal springs along the coastline. Newly discovered "breathing sinkholes" indicate a relationship with other caves. That is, there may be water and air flows from cave to cave, possibly throughout the entire area. These "breathing sinkholes" also contain unique ferns and mosses.

Scientists are discovering that these caves have features found nowhere else in the world, including subterranean micro-habitats that are warm in winter, cool in summer, and humid year round. The water in these caves tends to separate, with the heavier seawater resting below the level of fresh or brackish water. Deep-water marine caves are one of the Earth's last and largely unexplored frontiers of undiscovered animal life. Bermuda's marine caves are considered a **Biodiversity Hotspot** due to their remarkably rich and diverse community of cave-limited animals. The salt-water lakes and associated networks of underwater passages contain species known as "living fossils" which means that they have survived while other related species have become extinct.

At least 35 new species have been identified including two new orders of crustaceans (shrimp-like invertebrates). Several species are of great scientific interest as they are found in only one or two other islands or areas of the world. An amphipod with no eyes discovered in 1987 is named *Bermudagidiella bermudensis* and is known only from two caves in Bermuda. It was introduced to the global scientific community by Dr. Tom Iliffe, one of the most prolific explorers and writers about Bermuda's caves (who worked for 11 years at the Bermuda Biological Station). Another newly discovered species named after

Dr. Iliffe (the shrimp *Typhlatya iliffei*) may even provide evolutionary clues as it is found in caves on opposite sides of the Atlantic, possibly predating the separation of the African and American continents.

Due to their limited distribution and the fragile nature of the marine cave habitat, 25 of these cave species in Bermuda are listed as critically endangered by the **International Union for Conservation of Nature Red List of Threatened Species** that guides conservation activities of governments.

A couple of the more accessible known caves have been visited, vandalized and polluted over the centuries. Church Cave, site of Bermuda's largest known underground lake, was used for worship services by an outlier Protestant group during the 17th century. This cave even holds the remnants of a boat



Church Cave entrance

"shipwrecked" during an exploration over a century ago. The construction of condominiums atop Ship's Hill by the Tucker's Point development has led to fears that vibration from the construction could cause collapse of the cave. Most of Bermuda's caves were shaped by collapse into deep, underlying voids. For example, under Ship's Hill the hard ancient "Walsingham" limestone forms the cave's foundation but is layered over by a newer and weaker "Belmont" limestone. Although described by a 1984 study as "relatively unspoiled", Church Cave was listed by the Karst Waters Institute, an independent US based international cave study organization, as one of the ten most endangered caves in the world. The fear is that any work done in the area is likely to upset the oxygen levels within the cave's water systems and likely result in the extinction of 11 endangered endemic species. A suggestion was made during the 2001 SDO process to place glass microscope slides between the cracks in Church Cave so as to indicate any widening due to construction. However, this is after-the-fact monitoring – not preventative – with any damage already being done.



THE MORE THINGS CHANGE:

1920s - 1930s

The Bermuda Development Corporation asked Government to pay for (1922) dredging of two channels (St. George's Harbour to Castle Harbour via Paynter's Cut; and Castle Harbour to Tucker's Town Public Wharf) and (1935) a private access road through Government land for construction trucks and transporting guests to St. George's – *"not intended for use as a Public Thoroughfare which would detract from the amenity of the Castle Harbour Hotel"*. Government approved dredging and road, but declined to pay.

The total area of land required by the company is less than 510 acres which the company desires to acquire and states has little economic value to the colony and has remained a backward undeveloped state upwards of a century. Less than one-third of it is arable, the remainder being chiefly rocky hills and sand dunes. It is very sparsely populated, there being far fewer inhabitants to the square mile than in any other part of the Colony.

The building of a luxury hotel on a difficult site was a remarkable undertaking and presented grave challenges. Pains were taken to avoid construction error. The hotel was actually erected twice: first in Teeside, England, where it was marked, dismantled, and shipped to the Tucker's Town site, and again in Bermuda.

When you get hold of these mammoth companies, they go along in juggernaut style, an avalanche business, and gobble up everybody in the way; and then get behind and say "We are sorry for you," because they have got what they wanted...

It is no use for our successors 10 years after to say "Our predecessors have given away our birth rights." We have the duty to do and there is no harm in protecting the colony as well as we can.

Blue Text: *Views of Government of the day*

ENVIRONMENTAL CONCERNS OVER THE YEARS

1995 - 2000

The Government places a high priority on protecting, conserving and improving the environmental quality of Bermuda. Legitimate conservation objectives must also be balanced against the genuine development needs of the community – this is the essence of the concept of sustainability.

The important environmental aspects of the property will be protected.

There is some evidence of minor leaching from two septic tanks in the area of the caves but despite this the creatures in the caves are alive and well.

[Note: Septic tanks have been removed]

BPL were permitted to clear “pathways” not exceeding 10 ft...on Ship’s Hill for an environmental impact study after Government issued a development order granting planning permission ‘in principle’ only...Instead, bulldozers have cleared a massive ring road around the hill, destroying virgin vegetation and cedar trees, marking sections with dye.

The estimated loss of woodland (31 percent) meant the effect on the remaining woodland would be greater.

The [National] Trust would hope now the developer...will support the public desire to see Catchment Hill saved. We hope they will be content with what they have got and not embroil the community in a long and drawn-out battle.

A 4,000 name petition opposing Catchment Hill development was presented.

There are any number of other sites which are now used for tourism which could be redeveloped before we decrease Bermuda’s attractiveness to visitors and defeat ourselves by destroying green areas.

 **Grey Text:** *Proponents of the development*

2011


The Ministry has gone through great efforts to attach stringent conditions to the SDO that would ensure a balance between the protection of the island’s environment and the enhancement of social and economic conditions... A landscape principle of 40% endemics, 30% natives, 20% non-invasive ornamentals and 10% of any combination of these will be applied to each proposed lot.

There are strict environmental covenants in the SDO which Tucker’s Point takes seriously and will comply with....

Our record is exemplary. We have a large number of caves on our property on Ship’s Hill, during the last period of construction we wouldn’t let cement trucks drive over them in case we damaged them.

Previous SDOs were benign in their environmental impact in comparison to this. This new development is not only on a vastly greater scale, but it’s impossible to comply with the restrictions they’re claiming on this SDO. How can they avoid cutting deep into the ground? It’s impossible to develop on this site without total environmental devastation. There will be an obliteration of the surface environmental features.

The current SDO, as it now stands, lays the ground work for saturated development and the fragmentation of practically all of the remaining natural habitats, beautiful vistas and woodland in and around the Castle Harbour area, all of which make their own vital and priceless contribution to Bermuda’s environmental, economic and social health.

 **Green Text:** *Objectors to the development proposals*

As small as Bermuda is, we are not insignificant. Our natural environment, and the Tucker's Point area in particular, is of global importance. The challenge is how to balance international obligations and the interests of future generations with the national imperatives to promote developments that boost the local economy and create jobs for the current generation. The analysis of these seemingly competing priorities should have comprised a critical part of a comprehensive EIA process. Given our size and the whittling away of lands protected in the Development Plan of 1983, Bermuda cannot afford to cut corners or get impact analysis wrong. What is remarkable is how consistent the claims on all sides of these issues have been over the years. In 2011, our reactions, fears and analysis of the tourism industry and what was needed to revitalize it are remarkably similar to the concerns expressed when we were emerging from the global recession of 1992-4 (see Excerpt of Competiveness Commission Report, Appendix VI).

“In the Bahamas, we are beginning to explore ‘blue holes’ – salt and fresh water caves hydraulically connected over large distances. We are discovering evidence of ancient species that now exist only in Cuba as well as blind shrimp and cave fish that have never been documented anywhere in the world. Some of these ‘blue holes’ may have been sacred spaces for the original...inhabitants. We have to be ever more careful not to allow bulldozing or careless development to be prioritized over the protection of our Antiquities.”

(Bahamian Official)

Another nearby cave, Bitumen, is so named because of the barrels of asphalt that were dumped there more than 50 years ago after surfacing of the roads. The barrels, along with piles of trash, are stuck in the ledges but there is concern that they could become dislodged and fully poison the lake at the bottom of this very steep cave. Two other caves on the Tucker's Point property are Wingate and Cahow Caves. These are hidden in Quarry Hill next to the Government quarry. Cahow Cave is of great scientific interest (not yet adequately researched) because of the ancient Cahow fossils still visible in the rock. Due to the thick overgrowth covering hills on the Tucker's Point property, the area has been incompletely explored and it is likely that additional caves await discovery.

Bermuda's caves are particularly susceptible to pollution from sewage and water run-off (for example from laundry and swimming pools). Unlike the softer looser limestone found in the rest of the island which tends to purify effluent that leaks from cesspits, Walsingham rock is dense. Polluted water can seep through crevices into underlying caves and kill off endemic cave life. The EIS commissioned by TP in 1996 admitted that “water quality surveys indicate that

Church Cave and Bitumen Cave have been impacted by cesspit leachate and Bitumen Cave contains trash including drums of hydrocarbon materials”.

A review of that study and further study done by Dr. Illife recommended: no development at all on Ship's Hill, cessation of all quarrying in the neighbouring Government quarry, removal of debris from caves used as trash dumps; and strict protection of the entire area.

In the absence of a scientific EIA, it is uncertain if the requirement in the 2011 TP SDO of a minimum setback buffer of 30 feet for all structures and excavation will be strict enough to protect the known caves. Due to the fractured nature of Bermuda caves, the highly irregular shapes and the lack of accurate cave maps, it is very difficult to delineate the boundaries of the caves. This compromise distance that civil servants suggested is based on their best caution rather than hard science. What is certain is that once damaged, these caves cannot be recreated.

“Where almost all of your country is developed, you have to be very careful with what is left – to lose it is to lose it all.”

(Carrbean Official)



Bitumen Cave with trash dump



Church Cave with underground lake

10: TUCKER'S TOWN HISTORY

The Tucker's Point site is unique not only for its biodiversity but also for its history. This is one of the largest tracts of land to be compulsorily expropriated for private tourism development. (It remains a sore point that during World War II lands in St. David's were expropriated to build the Kindley airfield, now L.F. Wade International Airport. However, that was for a public project.)

Some members of the House of Assembly in 1920 were also dominant merchants in Bermuda and were concerned about the uncertainty of freight service at the time between New York and Bermuda. They convinced the Furness Withy steamship company to provide regular freight and tourist cruise service. In exchange Furness Withy received the right to acquire land in order to build a winter playground resort for elite US and British visitors. Furness Withy's application to the House of Assembly early in 1920 stated:

The company has already expended a very large sum to purchase steamers for the New York-Bermuda Service and contemplate increasing their fleet in the near future, and feel strongly that the apathetic or unreasonable attitude of a few small land holders should not be permitted to block an enterprise of such great importance to the full development of the Colony as a tourist resort, and thus prevent the Company reaping a reasonable financial benefit from their investment.

In response, 24 freeholders presented their own petition to the House of Assembly on July 23, 1920. Twenty-two of the petitioners were black and two were white (representing the Anglican Church which owned about 40 acres in the area). This petition noted that, in comparison, expropriation in the UK was for public (not private) ventures and further warned of the power of a large foreign company:

ECHOES OF THE PAST

Tucker's Town was named for one of Bermuda's most colourful governors, Daniel Tucker, who arrived on the island in 1616. He proposed that the site on the western side of Castle Harbour be developed to replace St. George's as the colony's capital and principal port. He laid down a road-way and town plan but *"the idea never captured anyone's imagination but his own"*.

By the early 1800s, a small free black community of fishermen and farmers lived in Tucker's Town. They were known for growing and weaving cotton (dyeing the fabric with vegetable dyes made from prickly pears, sage bushes and indigo plants). During the nineteenth century, most of Tucker's Town's white population gradually moved away. By 1900, the inhabitants were largely a tightly-knit, isolated, black community. *"There were two churches, a school, a cricket pitch, a post office and a cemetery on the knoll behind the church. Boats were still being built. Pigs were slaughtered, potatoes graded. Vegetables were dispatched by cart to Hamilton for sale. The rhythms of life were woven through these activities."*

In 1919, the Trade Development Board convinced the UK Furness Withy steamship line to provide regular freight and tourist cruise service from New York to Bermuda and granted Furness Withy *"a guaranteed 5 year contract, an annual subsidy of £27,500 and the right to purchase land."* The Bermuda Development Company Act (#1) granted the company the right to purchase the St. George's Hotel as well as 510 acres of land in Tucker's Town to develop a golf course, country club, hotels and cottages for tourism. The company's original goal was

to sell 300 one acre plots for private ownership. *"The entire strategy to create an exclusive winter golf club and residential playground for wealthy families on the east coast of the US hinged upon the acquisition of all of the land in Tucker's Town...No rich American...was going to buy an expensive mid-Atlantic building lot if there was the slightest chance that their serenity might be troubled by Saturday night rum and chowder parties by local coloured farmers and fishermen."*

Furness Withy's application to the House of Assembly of February 17, 1920 requested the power to expropriate land which they claimed was *"backward and undeveloped...of little economic value...very sparsely populated"*. About three-quarters of the owners are said to have agreed to sell. The company characterized the remaining owners of about 100 acres who refused to sell as *"indifferent...[who] failed to grasp the great advantages which will accrue to themselves and their neighbours by the intended development, and in some measure to the agitation of a few who for reasons of their own desire that the district shall remain in its present backward state"*.

These owners petitioned the House of Assembly in the summer of 1920, noting *"in common with most others in these Islands, they have a natural love and attachment for their lands, houses and homes."* They warned:

"Although the said Company proposes to use the said lands for developing the tourist and hotel business, there is no obligation imposed on the said Company to carry out such object."

Two members of the House of Assembly insisted that the Petition be read in the House:

The introduction into these Islands of a company with a large capitalization means of acquiring large areas of land is an exceedingly dangerous experiment which may eventually result in as serious a curtailment of the political and commercial freedom and independence of the people of this colony as has been brought by powerful commercial organizations in many places of much greater area and wealth than these islands.

Two members of the House of Assembly expressed concern that lands acquired from owners who didn't wish to sell should be safeguarded from speculation and introduced an amendment *"that the Company shall not sell, mortgage, lease or otherwise dispose of any lands compulsorily acquired except with the previous sanction of the Legislature."* The majority felt that the mortgage and lease provisions of the amendment were too restrictive but did concede that the Company should not outright sell the land without prior consent of the Legislature. By a vote of 19 to two the House of Assembly passed the Bermuda Development Company Limited Act (#2) that set out an elaborate expropriation procedure.

The legacy of that 1920 debate echoed through the 1995, 2001 and 2011 applications for SDOs on the Tucker's Point site, in particular with regard to the golf course. Bermuda Properties Limited ("BPL") (parent company of Castle Harbour Limited and related companies) purchased 240 acres from Furness Withy in 1958. Section 7 of the Bermuda Properties Act 1958 ("BPA") required Legislative approval to dispose of any part of the golf course or use it for any other purpose than fairways or greens. During the 2011 TP SDO application civil servants broached the idea of minimum development on the golf course to avoid extending a footprint into conservation lands.

I don't believe any such Bill has ever been introduced into any country in the world for the purpose of granting to any private company the expropriation of lands for the carrying on or the establishment of a private undertaking. It is an axiom that a man's house is his castle, and it is an improper thing for the Legislature to undertake to dispossess a man from his freehold.

However, they were unsuccessful in their bid to add restrictions to prevent the mortgage or lease of the lands. The Bermuda Development Company Act (#2) set out three procedures to determine the price to be paid to reluctant landowners: (a) a three-man commission appointed by the governor to broker differences between buyer and seller; (b) and an arbitration panel to impose a price; or (c) a jury of "peers" to decide a binding price. *"The act exuded a sense of British fair play steeped in common law precedent. Yet, for all its due procedure, the act left no doubt that expropriation was the unavoidable fate of the Tucker's Town die-hards."*

Two years of "negotiation" and arbitration ensued. In the end, only one resident of Tucker's Town was actually physically evicted. From the day Dinna Smith signed the petition, she refused to negotiate or to leave.

Finally, late in 1923, the police were called. Smith's possessions were removed and, when she once again refused to go, she was carried out. Her home was boarded up and old Tucker's Town ceased to exist.

The first major project was the excavation of four water catchments capable of holding a total of 3.25 million gallons of water which

continue to serve this purpose on Whitecrest (formerly Catchment) Hill. The Mid-Ocean Golf Course was completed in 1922 and building of the Castle Harbour Hotel and Golf Club began shortly after. Some 600 labourers were recruited from the Azores to work on the site. During World War II the hotel was turned over to the United States Government as its headquarters and accommodation for US Army troops stationed in Bermuda.

After the war, Furness Withy decided to divest itself of many of its worldwide tourism properties including the Mid Ocean Golf Club. A group of Bermudian investors formed the Mid Ocean Club Limited in 1951 to purchase 180 acres including the golf club, course and beaches for £130,000. This purchase set out cooperative arrangements that continue to this day: reciprocal tee times; rights of way to the beaches; and, pipelines through the golf courses from water tanks.

In 1958 Furness Withy sold the hotel and its remaining property in Tucker's Point to Bermuda Properties Limited. In 1986 the hotel reopened after refurbishment under the management of the Marriott Hotels and Resorts. However, by 1995, the hotel had accrued losses reportedly of \$40 million. Indeed, this financial predicament was the rationale for the first SDO application: it was claimed that Marriott had threatened to leave Bermuda unless profits improved. The then Minister approved the development of residences at Ship's Hill for sale to foreign purchasers. Thus came to pass the warnings of the original petitioners and the two dissenting voices in the 1920 House of Assembly debate.

This was rejected “because of statutory restrictions that were placed on the golf course”. The BPA is capable of being amended. Indeed, it was amended in 1989 and in 1998 (to allow residential development on Shell Point Road and to establish the boundary within which greens and fairways could be altered). The principle that compulsorily acquired lands should not be used for any reason other than the hotel and golf course was not always adhered to.

The golf course remains a source of considerable angst, especially amongst some descendents of the owners from whom the lands were expropriated. In the middle of the golf course, below the practice tee, lies the original graveyard (lost in bush for many years). TP initiated the project to fund and clear the area and build graves and walls. TP also allows archeological research using non-invasive imaging technology. These actions bring a measure of respect. However, the golf balls that rain down daily onto the graves from the practice tee above detract from the sacred purpose. The graveyard does not simply prove that a community existed. Rather, it is a testimony to a vibrant, well-organized community that met its own social, economic and cultural needs (from free blacks before Emancipation through almost a century after).



THE MORE THINGS CHANGE:

1920s

We can trust our Bermudians to see that justice is done as between the company and the individual...I feel this Legislature has done all it possibly can to safeguard the interests of Tucker's Town and the country in particular, and I hope they will never regret the action their representatives have taken on their behalf.

The amendment offered [To prevent the Company from disposing of compulsorily acquired land] seems to put these restrictions on, yet I feel to do that the Company would say they would have nothing to do with the whole thing because they are too strictly tied down.

Some owners, especially in the area of Tucker's Town, were opposed to parting with their land, giving as reasons their unwillingness to leave their homes or to part with their freehold property votes.

The total area of land required by your petitioners is somewhat less than 510 acres...the whole of Tucker's Town in St. George's Parish, estimated at 300 acres, together with portions of Hamilton Parish to the north and west of Tucker's Town comprising the balance.

They are possessed and entitled to one hundred acres of land or thereabouts of the said lands...they have established homes on these lands; and they follow vocations peculiar in some respects to the locality... They do not desire to part with or be deprived of their present homes and present vocations under any conditions whatever and they humbly beg to point out that no monetary compensation can adequately recompense them for the loss of their lands, houses, vocations and homes.

Blue Text: Views of Government of the day

HISTORICAL / RACIAL CONCERNS OVER THE YEARS

1995 - 2000

The land was taken from Bermudians in the 1920s and there were no future guarantees that it would not move further away from them in the years to come.

The past and its emotional ties could not be forgotten, but MPs had to move with the times for the good of the country.

We have spent a lot of time on the emotional side of this subject but that happened nearly 80 years ago.

I can only hope that what we do today will not be detrimental to future generations.

Marriott marketing: Because of the [BIU] Union regulations that if you have over 70% occupancy we have to bring in a full employment of the staff, so when we get to 60% we stop marketing and we tell people Bermuda is closed.

We were hurt at how the land was taken from us. Some of us are even angry.

What we are looking at here is an insult to the integrity and the dignity of black people who were down there in that area. They farmed the land, it was their home, they were just pushed out and they had no powers.

The question at issue here is: are we going to further entrench an injustice that took place 70 odd years ago?

What you do today will come back and haunt you. If you don't want to be part of this unjust enrichment, you should condemn it.

 **Grey Text:** *Proponents of the development*

2011

The Government is very mindful of Bermuda's history and the legacies that continue to this day...The Island's sustainability needed a balanced appreciation and attention to not only our environmental history and future, but also our economic and social history and future.

Government [has] sympathy for descendants of families who were forcibly removed from Tucker's Town in the 1920s...We are unable to undo the past but we can certainly take steps to ensure the future well-being of our people.

A failed Tucker's Point would indeed be a travesty for those who gave up so much only to have it fail.

The original inhabitants moved from Tucker's Town to allow Tucker's Town to be developed as a tourist destination. Tourism development was in the National Interest as it is 90 years later in 2011.

We must save this pristine landscape, once a vibrant community and home to black Bermudian ancestors, as a tribute and memorial to their loss, their sacrifice and their memory.

Some of the descendents of those Bermudians who lived in Tucker's Town before 1919, when the Government of the day decided to compulsorily acquire the area...are horrified that the graveyard where their ancestors lie is in the middle of a golf course at the failing five-star resort.

For the last SDO, they knew what it meant and still built the clubhouse and practice range right above the graveyard. We are still upset.

The SDO is a bailout of non-Bermudians at the expense of the Bermuda public.

 **Green Text:** *Objectors to the development proposals*

“The graveyard is a poignant metaphor for the whole thing. It is ‘preserved’ but out of context because it is in the middle of a golf driving range. The physical asset remains, but not within its purpose of peace and homage.”

(Bermuda Resident)



***GOLF, THE GOOD LIFE
AND THE GRAVEYARD***

“That horror story is now part of our history but the SDO taught all Bermudians a lot about those times – which is the only positive thing I can think of to do with this SDO.”

(Bermuda Resident)

"In memory of the members of the Tuckers Town Methodist Community who faithfully toiled in the service of the Lord and in the light of his love. 1861-1923."



"God is our refuge and strength, a very present help in trouble. (Psalm 46:1)."

Plaque presented by Bermuda Properties Ltd. and dedicated by the Marsden Memorial Methodist Church congregation. November 24, 1996.

"...this may be a sign among you when your children ask in time to come, saying, 'What do these stones mean to you?'"
(Joshua 4:6)



11: TUCKER'S POINT SPECIAL DEVELOPMENT ORDER

TP has been the beneficiary of three SDOs prior to the 2011 SDO (one in 1995 and two in 2001). Together the four SDOs represent the largest encroachment on protected lands for tourism development (in absolute terms and also in terms of habitat value and biodiversity). The 1995 SDO set out TP's Master Plan to develop the site on woodland, open space and coastline in phases over several years. The overall vision included relocating the fairways along the shoreline, extending the hotel and building a golf clubhouse, luxury residences at Ship's Hill and Shell Point Road, a shopping complex and tennis club. The first SDO in 1995 saw widespread removal of conservation protection with approximately 20-30 protected acres opened for development.

The justification for lifting conservation zoning protection was that proceeds from the real estate development would fund reconstruction of the hotel. TP did keep its promise to do so. However, the Marriott group that was managing the hotel in the 1990's experienced severe losses and threatened to leave. TP projected that the investment into the hotel of \$65 million would pump \$13 million into Bermuda's economy annually. The 1995 SDO proposal began as an application through the normal process but evolved into a SDO application as the DAB could not approve changes to the conservation zoning. Accordingly, there was a two week period of public objection.

Critics dubbed the project a "massive smokescreen" to hide large scale residential development: *"The short term boost to construction would be offset by the amount of capital that would flow out of the island...Rental income would be shared pro-rata between non-Bermudian home owners and the foreign controlled Bermuda Properties Limited."* There were also objections on environmental grounds with particular concerns that the ancient caves could be damaged by foundation work and pollution from cesspits and water run-off from pools and landscaping. TP initially produced an EIA that received a D rating ("poor") from an independent rating agency. A second, revised EIA received an A rating ("good").

The then Minister was persuaded that it was in the national interest – revitalization of the tourism industry – to grant the SDO. Public distrust took hold when the 10 foot wide pathways approved to enable the environmental survey to be done were actually cleared to 14 feet instead and virgin vegetation and cedar trees were marked with dye (actually to identify trees to be saved). The development did not turn out as hoped. Costs of the hotel investment were underestimated and ended up being in the order of \$130 million. Revenue projections did not materialize. The vision was also interrupted by the tragedy of 9/11 which made US investors skittish about foreign ventures.

Marriott left in 1999 and TP scrambled to develop a viable plan. The company embarked on a new plan for mixed use development – a combination of hotel rooms, fractional units (a deeded version of timeshare) and individual high-end residences available to foreign owners. Although some of the lands for this phase had been rezoned by the 1995 SDO, the two 2001 SDOs lifted protection from an additional two acres of woodland and coastline.

TP projected that the development of the golf club plus 13 detached houses and 13 townhouses (later increased to 18) clustered in two and three units at Ship's Hill would contribute \$288 million to Bermuda's economy over the next 10 years (\$5.6 million annual revenue plus a capital investment of \$75 million with a 2.2 multiplier effect). Again, there were strident objections and again the Minister of the day deemed it in the national interest to grant the SDOs. Although TP did have early success in selling fractional and residential units, these SDOs did not stave off financial problems.

The 1995 approval 'in principle' required that TP prepare an EIS and conduct cave surveys. This entailed terrestrial and sub-terranean ecological inventories and numerous consultations with the Departments of Planning, Tourism, Immigration and communication with

neighbours, the local community and local environmental groups. TP promised that the development would provide substantial benefits and protection to the caves. Throughout the subsequent construction process, for example when building the first golf tee, TP diligently consulted with the Department of Conservation Services and delayed construction when fissures were found in the rock. TP also erected a protective entrance to Bitumen Cave. Further, the company must be commended for rehabilitating a 5-6 acre area which had been used to dump hotel waste over the years. This is now the 18th hole of the golf course.

However, TP's financial woes continued. The turnaround was further derailed in part by the recent global recession. TP was pressed to secure its debt: the *"Bank's objective [is] that Castle Harbour Limited should raise sufficient capital through real estate sales to reduce debt to a sustainable level and should identify other longer term real estate development opportunities which will represent additional asset value for Castle Harbour Limited and improve the Bank's security on a loan to value basis."* Once again, TP viewed a SDO as the only and critical vehicle to secure real estate development opportunities. TP began discussions at least as early as 2009 to remove the conservation protection from additional acres of land.

The final version of the 2011 SDO lifted conservation zoning off of 12.4 acres of land (1.3 acres Nature Reserve; 8.5 acres Woodland Reserve; 2.6 acres Coastal Reserve). As part of this SDO, Tucker's Point donated some 40.5 acres of its property to the people of Bermuda. Trade-offs of sensitive land for development rights are not unusual for SDOs and agreements under s. 34 of the DPA. The purpose and work of the Department of Conservation Services is to protect as much virgin land, species and habitats as possible. Accordingly, the Department has set a goal of encouraging 110-150% of donated lands in exchange for development rights that encroach into conservation areas. The 2011 TP SDO gift of 40.5 acres (versus 12.4 acres of conservation land opened for development) represents, at first glance, a hefty return of 350%. However, as there were no donations for the 1995 and 2001 SDOs, the 2011 donation represents an overall return to the public of TP conservation lands of approximately 100-110%.

Cynics point out that almost half of the 40.5 acres is underwater – 18 acres of Mangrove Lake. Further, some of the other donated land is very steep and thus costly to build on. Moreover, the public will now be saddled with the costs of conservation and management. In my considered opinion, the scale of the gift is still significant and ought to be welcomed given the rapid urbanization of our 21 sq. mile island. Some people do worry that there is nothing to prevent a future government from rezoning, building on or otherwise releasing the gifted lands for development.

Opponents of the 2011 TP SDO application reiterated concerns about foreign ownership that had been raised in 1995 and even 1920. Although the successive TP SDOs have been lambasted as an attempt by foreign investors to rape Bermuda, it must be noted that some 55% of preference shares and 19.5% of common shares of the TP group of companies are now owned by Bermudian investors (individuals, companies and a small portion of a local pension fund).

It is fair to say that it was not TP's preference to develop on conservation land – it did not seek rezoning during the 2008 Bermuda Plan process. However, driven by its financial crisis in 2011, TP resorted to a tried (critics may say "but not true") strategy to support its debt.



Photo: Images of Money

THE MORE THINGS CHANGE:

1920s

What the Honourable member is desiring to do is limit the powers of the Company in acquiring lands actually required for the carrying on of their business...

This Colony has been for years endeavouring to get a steamship company interested in Bermuda as would make it permanent. This scheme would ensure that.

To extend the resources of Bermuda for the accommodation, comfort and entertainment of tourists...It is essential that a site should be acquired capable of providing in one area accommodation for the whole of the facilities for outdoor sports...with capacity for extension in future years.

Unless [expropriation] or some other procedure which your Honourable House may consider preferable is adopted your company will be compelled to abandon their intended scheme of development as no other area in the Colony present similar advantages or means of fulfilment of their objects.

Your Petitioners are also informed that the [Bermuda Development Company Act, 1920] provides for the acquisition by the Company of the said lands without the consent of the owners if they are adverse to parting with them.

Your Petitioners humbly submit that a company should not be permitted to acquire lands without the consent of the owners unless it unquestionably be shown that such a company has been of known and proved benefit to the inhabitants of the locality wherein such company operates and that the Company is not dealing in a speculative and precarious business.

Blue Text: Views of Government of the day

FINANCIAL VIABILITY CONCERNS OVER THE YEARS

1995 - 2000

Sending the wrong type of message to financiers would be detrimental to Bermuda. We are going to have to roll out the red carpet for some of these people, because if they do not come here they will go elsewhere.

[Critics] overlook the relevance and importance of the [BPL] Master Plan to tourism generally, and to the viability and future of the Marriott resort specifically.

Critics do not understand the concept of a residential resort: it is for the benefit of the resort as a whole that they are available for short term rental. The hotel infrastructure will support all these units.

[The 1996 Act] was crucial to the hotel getting new investment, without which it would be forced to close.

Our only asset is land. We are trying to convince [Marriott] Host that this land is a valuable asset and crucial as a part of the solution to the hotel.

The properties would pump \$13 million into Bermuda's economy annually on the basis that each householder spent \$500 a day and that the occupancy rate was 70%.

Those people who originally thought that this development was not so bad because it would benefit the sagging tourism industry are beginning to think that they were duped. It seems now that tourism was an excuse and a cover and this is really just greedy exploitation of Bermuda.

It is not financially viable to justify environmental destruction. The economic viability of building more condominiums in a market already swamped with them was questionable.

Existing owners bought in good faith that the zonings were meaningful and that they would protect the beauty of Bermuda. By allowing this development to take place, these reasonable expectations are trampled upon.

 **Grey Text:** Proponents of the development

2011

It's so important we send a message to the investor community that we are investing in hospitality and tourism...if we don't do it, they will continue to go to Barbados and Bahamas and Jamaica.

The failure of Tucker's Point would make it more difficult to attract investors in Bermuda's tourism product... the potential effect on tourism posed a considerable risk for our country, meaning a SDO would be in the nation's interest.


It's as if they are blind to the implications to Bermuda. They are not economists, they are environmentalists and they don't understand.

The expansion was needed to ensure the success of Tucker's Point which was losing more than \$1 million a month from the start of 2000 through to the end of August 2010.

This is the solution, we are convinced we are on the right track; we can turn this hotel around.

Many successful hotels today are built on the back of residential units...The real estate is a silent investor. It is capital; you don't have to go find a shareholder to put up that money. .. It will allow us to repay our loans. It will also help by bringing people to our resort.

One of the reasons the hotel has struggled is because it does not have enough rooms. So it seems strange that the major concession made by Tucker's Point is to drop a new hotel wing but to retain the residential components of the property, although some can be leased back to the hotel. This appears to fly in the face that the SDO is critical to the success of the hotel and the tourism industry and makes it look much more like a real estate deal, which cannot be in the public interest.

 **Green Text:** Objectors to the development proposals

Rights to develop additional land are intended to generate collateral and the sale of high-end residences would generate cash flow in the hope that – this time – the SDO would secure TP's solvency.

In July 2010, based partly on the advice of a senior civil servant, the Government required TP to pursue an additional strategy to address its financial situation – that is, to attract a world renowned resort management company with a marketing base. The Rosewood group had been interested in TP since at least 2000. In the current economy, it was argued that the SDO was necessary to seal the deal. Rosewood will manage the hotel golf and beach clubs only, but not the sale and management of the residential units. It is unclear to what extent Rosewood's global green initiatives would impact development under the SDO. It is also unclear whether or how Rosewood's corporate culture and green commitments may change since its sale in summer 2011 to the New World Hospitality group. Rosewood is credited with a 10% increase in hotel occupancy and revenue since summer 2011. This confirms that good management is at least as critical as real estate to turn the hotel's fortunes around. Laudably, there has also been intense training of staff (98% of whom are Bermudian).

TP had presented its SDO application in February 2010 to the Cabinet Committee on Special Hotel Development (comprised of the Ministers responsible for finance, tourism, environment, planning, housing, public works, immigration and the Attorney General). In theory for the TP SDO, the respective civil servants would meet periodically to sort out issues arising from such presentations. The process did not quite work like this in this case. There was email communication but nothing in the order of a central coordinating team.

The SDO was viewed as a planning tool only and tourism officials were not very engaged in the TP SDO process. Indeed, the tourism officer with the greatest expertise in the hotel development approval process and institutional memory of prior TP SDOs was seconded to another department from September to mid-November 2010. The evidence before me was that this was intended as a growth opportunity, not for the purpose of avoiding her scrutiny of the SDO process or content. The result was that, although her tasks were covered by a less experienced officer, her expertise was not focused on the 2011 TP SDO application. This was a questionable transfer – inefficient at best. As the rationale for the SDO was tourism, this Ministry should have been engaged – fully – given that this development is major, of national priority and impacts on the Bermuda tourism product.

Further, Ministry of Environment officials were left to respond to the SDO application without full information on its financial aspects. There were extensive financial reviews by two overseas consultant groups (one with direct expertise in hotel development and the other already engaged by the Government on planning and public works projects). As they are not civil servants and as their work was presented directly to the Cabinet Committee, their report is exempt from my investigation (so certified by the Secretary to the Cabinet under s. 13 of the Ombudsman Act). The evidence before me is that senior civil servants within the Ministries of the Environment and Tourism were not privy to this financial analysis. They were tasked with giving advice but did not themselves have all relevant information.

Financial analysis was important: not only to assess the potential success and impact on jobs for Bermuda, but also for civil servants to comprehend the moving parts. For example, just days before the House of Assembly voted on the first version of the SDO application, the Mid-Ocean Club revealed that TP would not be able to develop nine proposed lots on Catchment Hill. Civil servants should have been able to analyze the impact of the loss of these lots on the proposal as a whole. A similar calculation should have been done in the week between the first and second Senate Debates. The first version of the SDO application contemplated 78 residential lots and 70 hotel rooms. A week later, the final version of the SDO reduced the proposal by all of the hotel rooms and 11 residential lots. There is no evidence before me that a new financial analysis was done to quantify the effect of this reduction on the overall assessment of whether the rezoning would achieve the purpose of the SDO – that is, ensuring the solvency of TP.

A few critics of the TP SDO called for TP to reveal its strategic plan and financial statements. In my considered opinion, it is inappropriate to require private developers to splay their proprietary and financial information in the public domain. I have no evidence that this is a best practice elsewhere. However, this does not mean there should be no disclosure at all. As TP is asking current and future generations of Bermudians to pay for the cost of its financial difficulties by opening up conservation lands to development, it is not unreasonable that an executive summary of the financial analysis and clear projections should be disclosed in order to assure the public that the proposal justifies the certain destruction of habitats. Inherent in Principle 10 of the Rio Declaration regarding public consultation is the need for disclosure of information.

In the absence of a national tourism strategy by which to benchmark and evaluate an application it is doubly important to have clarity and disclosure about its feasibility. In order to be credible, the TP SDO application needed to explain why an approach that did not seem to be effective in the past would be successful now – in light of serious questions about the viability of fractional sales, and especially at TP’s very high price point for real estate units. An executive summary of the consultants’ financial analysis could have given civil servants and the public some insight and comfort with respect to the financial assumptions (about the tourism industry generally and the viability of TP specifically).

TP asserted to Government in May 2009 that: *“Fractional ownerships are now widely recognized as a successful tourism product and its growth in the market needs the support of Government.”* Yet, just one and a half years later the market had changed. In November 2010 TP told shareholders that the fractional residence club market worldwide had stagnated. There are no guarantees of TP’s success even with the 2011 SDO. Robust early sales from development on land rezoned for the 1995 and 2001 SDOs (approximately 50% of the fractional units were sold) did not stem TP’s financial difficulties. The permanent destruction of the land and habitats opened to development is a far more certain result of the development. The issue is not whether TP should be allowed to develop. The issue is whether removal of conservation zoning is the route to TP’s solvency. If so, how can risks to the environment be mitigated? A full EIA, inclusive of a review of financial feasibility; rather than an ad hoc, time-pressured approach was warranted to examine risks, mitigation and alternatives.

For the TP SDO, despite the absence of an EIA, civil servants made good faith efforts to specify concerns. The Department of Conservation Services categorized (but without the detail of an EIA) the likely environmental impact on each lot in the original TP SDO proposal (the 59 lots on Catchment Hill were not categorized as these had previously been approved for development):

- *LOW: minimal environmental impact on natural habitat (excluding unknown cave systems) [6 lots]*
- *MEDIUM: limited environmental impact (excluding unknown cave systems) that could be reasonably mitigated by surveying the areas for best development / least environmental impact [8 lots]*

DEED OF COVENANT WITH MID-OCEAN CLUB

Since the late 1950s, the Mid-Ocean Club and TP had agreements for reciprocal tee times, water use and rights of way to beaches. However, Mid-Ocean objected to the 1995 SDO application stating it “needs to be satisfied about the preservation in perpetuity of other undeveloped areas owned by BPL, including Catchment Hill, Paynter’s Hill and the hill behind Castle Harbour Hotel”. BPL responded “there are no plans or proposals to develop Paynter’s Hill or the hill to the north of the hotel”.

In 2000, the companies negotiated (1) a ‘Deed of Exchange’ (swapping an acre of TP’s woodland overlooking Mid-Ocean’s 5th Tee for a Mid-Ocean maintenance building where TP’s tennis club is now) and (2) a ‘Deed of Covenant’ (restricting TP construction on a portion of Catchment Hill). Mid-Ocean was concerned that denuding the hillside of trees would not only destroy the view and ecosystem but also could cause flooding of the golf course.

TP donated seven of the affected lots to Bermuda in the final version of the SDO.

- *HIGH: not recommended for residential development; major impact on existing natural features from woodland fragmentation, specimen trees (endemic / native/ naturalized), habitat value, visual / aesthetic / Bermuda's image and known and unknown caves. Some of these can be mitigated with appropriate planning and conservation assessment but would have significant adverse impacts on Bermuda's environment [5 lots]*
- *VERY HIGH: immediate extreme environmental impacts and critical habitat degradation; greatest impact on recognized environmental "biodiversity Hot Spots", cave systems, critically endangered plant species and habitat and associated resident or migratory specified fauna. Limited mitigation could be provided with surveys, costly engineering solutions and appropriate planning assessment based on a conservation foundation. [4 lots]*

The above analysis did not reach the decision-makers at TP or the Legislators. After the final SDO from the second Senate Debate, there remains: one lot approved for development that would have *VERY HIGH* impact on the environment; five lots with *HIGH* impact; and, eight lots with *MEDIUM* impact. The Departments of Planning and Sustainable Development initially expressed concern that TP's financial viability was tied to the SDO and advised that no development should be approved for any of the *MEDIUM* to *VERY HIGH* impact lots. The proposal was tweaked until technical officers could pronounce it as "acceptable", albeit without the benefit of an EIA. None of the Department of Sustainable Development's recommendations regarding water, energy, LEED design or recycling were reflected in the TP SDO conditions.

"Extraordinary claims require extraordinary evidence."

(Carl Sagan, Scientist)

"The recession has skewed statistics to the point where professionals in the industry could not indicate with confidence whether the fractional model has levelled off or is still in decline."

(2010 Tourism Conference)

"If Bermuda were a remote place that investors are less aware of, then high EIA costs and strict regulations might scare developers off. But Bermuda has enough of a solid reputation to justify developers investing in the due diligence there."

(US Resort Investors in the Caribbean)

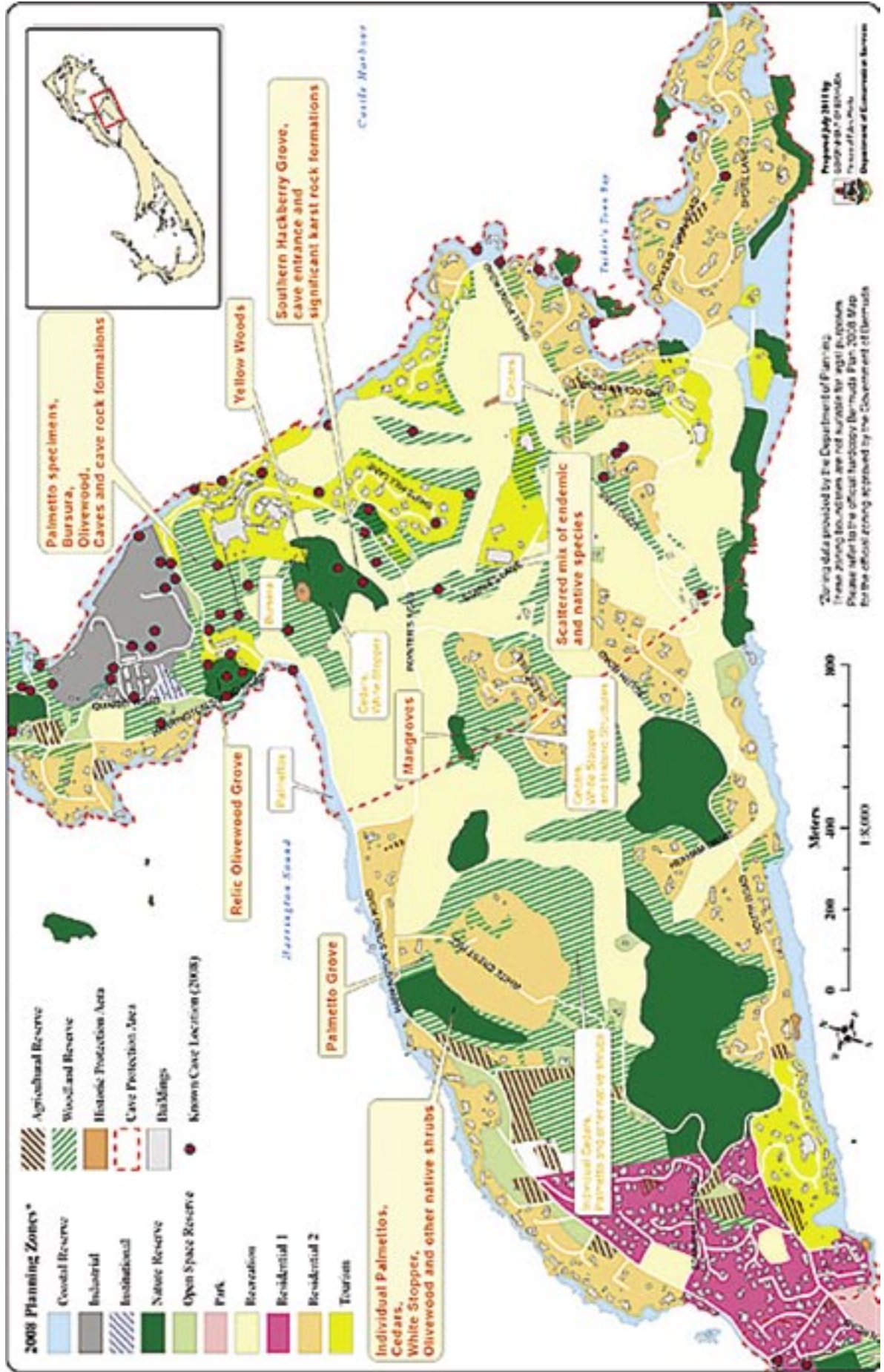
MOTOR CAR AMENDMENT (NO. 2) ACT 2010

Temporary residents may also have access to the use of cars in Bermuda. The Motor Car Amendment (No. 2) Act was passed unanimously by the House of Assembly on 23 July 2010. It is not yet in force. The purpose of the amendment is to allow vehicle hire operations to be run by fractional-unit developments such as Tucker's Point. Permits would be issued to vehicle hire operators for

no more than 10% of the number of units in the fractional development up to a maximum of ten vehicles (no larger than Class C).

The operators would be able to lease the vehicles to allow temporary residents in the fractional units to drive cars while visiting Bermuda. These residents are prohibited from owning their own cars and would have to obtain Bermuda drivers' licenses.

TUCKER'S POINT • ENVIRONMENTAL FEATURES

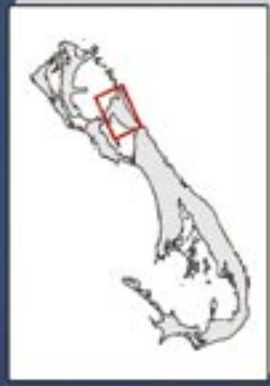


TUCKER'S POINT • DECEMBER, 2010 PROPOSAL

Castle Harbour Limited Mixed Use Development Special Development Order Site Plans

Digitized from Conyers and Associates Drawing A100 - Dec. 2010

■ Site Plans



Prepared July 2011 by
GOVERNMENT OF BARBADA
Ministry of Public Works
Department of Conservation Services

2010 Satellite Image
Copyright: Ministry of Environment, Planning and Infrastructure Strategy

TUCKER'S POINT • MARCH, 2011 PROPOSAL



12: SUSTAINABLE TOURISM

During the debate about the TP SDO fears were expressed that public objections combined with strict Government standards would make Bermuda seem unfriendly to foreign investment. The primary rationale for the TP SDO was that the resort was too important to Bermuda's tourism product to fail. It was argued that, notwithstanding that the Government was not at fault for TP's financial difficulties, Bermuda's entire reputation as a tourism destination would be tainted if the SDO was not approved. There is a myth that competitor tourist destinations especially in the Caribbean are so desperate for foreign investment that they are willing to overlook environmental constraints.

It is certainly true that islands with consistent tropical climates, lower costs and more land can offer beneficial deals, temporary work permits and other Government support to potential investors. There are particularly attractive deals for investors who introduce infrastructure to undeveloped areas that, in turn, spurs on local housing and businesses. It is not true that governments in tourism dependent islands are heedless of international environmental obligations and standards. With increasing understanding about the importance of ecosystems to both the health of the planet and to human populations, protection status for different ecosystems is being evaluated more closely. Many countries have developed National Biodiversity Strategies and Action Plans that actually inform planning decisions. (Bermuda's comprehensive Biodiversity Strategy appears to sit in a silo somewhat apart from active decision making on development applications.) Implementation of biodiversity goals in the Caribbean has been uneven due to lack of financial resources. Nevertheless, countries are now turning their attention to refining and re-aligning their goals, targets and strategies for the second decade of implementation of the Biodiversity Conference. With more ambitious benchmarks for 2020, Caribbean countries are strengthening, not reducing, their compliance.

“Beggars are not choosers – we do make concessions to developers in exchange for them developing the infrastructure to locate resorts in remote areas. Bermuda is another ball game – you are so small, you have to be even more careful than us. We have space; you don’t.”

(Caribbean Official)

ROSEWOOD IN MAYAKOBA, MEXICO

In May 2011, at the World Travel and Tourism Council Summit, President Calderon announced that Mexico will make sustainable tourism a national priority. The Rosewood sustainable tourism experience in Mayakoba, Mexico is of interest to Bermuda.

OHL, the owners and developers of the complex, has received a number of important accolades – for example, in 2010 from Rainforest Alliance who recognized OHL for being the first Tourism Development in Latin America to apply the Global Sustainable Tourism Criteria. The Mayakoba property, which had been significantly degraded due to prior cattle ranching, is also among the few examples of a project in which the development actually resulted in higher biodiversity and a healthier natural environment after development.

OHL has required strong ecosystem protections from the three hotel operators on the Mayakoba property – Fairmont, Rosewood and Banyan Tree (above and beyond Rosewood's own internal Verdis Initiative). Fairmont has been the leader in best practices, for example, using only native species in its landscaping to support the natural biodiversity. Rosewood had introduced exotic foreign species which is less desirable.

Rosewood was sold in summer 2011 to the Hong Kong based hotel management company, New World Hospitality, with the stated purpose of expanding into the Asian marketplace with Rosewood's luxury branding. Although Rosewood does tout its green initiative, there is no corresponding information on New World Hospitality's public information website about its sustainable tourism awareness.

All eight Central American and just over half of all Caribbean countries, including all of the Commonwealth countries (13 of the 24) are signatories to the Biodiversity Convention that initially established the following conservation target in 1999: *“At least ten percent of each of the world’s ecological regions are effectively conserved.”* In 2010, the Biodiversity Convention revised the targets: *“By 2020, at least 17 per cent of terrestrial and inland water, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes.”* In 2008, eight Caribbean nations formed the Caribbean Challenge Initiative, committing to protecting 20% of their near-shore marine/coastal environments by 2020 (Antigua and Barbuda; Bahamas; Grenada; St. Lucia; St. Kitts and Nevis; Dominican Republic; Jamaica; and St. Vincent and the Grenadines).

The Conference on Caribbean Sustainable Tourism (hosted by Bermuda, April 2011) noted that sustainable tourism is a growth industry. As an Associate Member of CARICOM, Bermuda has agreed to promote sustainable tourism in addition to conservation of forest and marine environments. Our tourism expert notes: *“There is growing global recognition that if these principles are not considered when planning new tourism developments, the long-term outcome will actually harm tourism business and potential investment. The World Travel and Tourism Council has stated that sustainable tourism may be the most significant transformation in the history of modern travel by changing the way tourism is developed, operated, and the way people travel. Those companies and governments that understand sustainable tourism now will become leading tourism destinations tomorrow. Increasingly, countries, investors, companies, and travellers are embracing the importance of sustainable best practices in making decisions – from the planning of tourism developments, to implementation, to choices made by travellers about which destinations to visit. Tourists are increasingly taking sustainability into account, as evidenced by numerous studies showing that travellers are willing to pay more to visit those places that have implemented sustainable practices, both environmentally and socially.”*

Once their basic demands for safety, accessibility and quality are met, tourists will prioritize sustainability. A recent Tourist Exit Survey found that 68% of all tourists visiting Bermuda are – in principle – willing to pay an extra amount of their holiday budget in order to fund activities to preserve our coral reefs. The 2010 Report by the Department of Conservation Services on *The Total Economic Value of Bermuda’s Coral Reefs* reports that the average cruise ship tourist is willing to pay an additional US\$28 per visit to Bermuda and the average airplane tourist is willing to pay US\$19 to protect the coral reefs. Moreover, 14% of tourists would not have come to Bermuda if our coral reefs were known to be dying or damaged.

Our tourism expert notes: *“Caribbean islands with limited remaining natural green space and fragile marine and land habitats are implementing sustainability requirements for approving tourism developments. It is well known that large scale tourism development projects can have economic burdens on local infrastructure such as costs of capacity of landfill (especially on small islands to accommodate construction debris and waste); the impact of heavy construction machinery; increased traffic; use of limited fresh water resources, and so on. These costs are often not counted – in terms of income versus leakages – as part of the real economic costs in project budgets. Ideally, these “opportunity costs” should be shared by developers, rather than by the taxpayers alone.”*

Guiding concepts such as the Precautionary Principle, Millennium Goals, Ramsar listing, Equator Principles, destination stewardship and carbon sequestration roll easily, genuinely and seriously off the tongues of Caribbean civil servants who deal with planning, the environment and tourism development. As an UK Overseas Territory, Bermuda is not well integrated into the international vernacular and standards. (Note: Bermuda did not participate in the EIA training offered March 2011 by CARICOM.) We are in danger of lagging behind. Bermuda does have a Sustainable Development Strategy and Implementation Plan and a related department of Government. However, the reach of the Strategy and Department has not yet permeated policy and operational decisions throughout the Government. The fact that “it costs money to be green” should not deter our standards or vision. In the absence of a sustainable tourism strategy, it is unclear whether we have fully evaluated the costs of not being green. Our tourism expert notes: *“Bermuda cannot afford to be viewed as an ‘old and outdated’ tourism destination that has missed the sustainability transformation underway in the global travel and tourism industry today.”*



Photo: Department of Communication and Information

THE MORE THINGS CHANGE:

1920s

The Company will be in a position to bring visitors to Bermuda. Anyone who studies it knows that now only a small portion of visitors return, which is due to a lack of enterprise in Bermuda, and unless some such recreation scheme as they propose can be constructed in Bermuda there will still be fewer to return.

The uncertainty of the steamship service has been the greatest handicap to business. And it has been difficult for merchants to provide themselves with what they consider the necessary stocks. I feel while expropriation for private purposes is a bitter pill to swallow, at the same time I think we will be supporting a measure by which we shall get a service sufficient for our needs.

These plans include the construction of first-class golf links and tennis courts, provision for sea bathing, yachting, fishing, riding and other outdoor sports, and the erection of a country club and hotels and cottages for winter and summer visitors to Bermuda.

No one here wants to see any company expropriate land and have the privilege of leasing them for 99 years for someone to build or exploit or have the privilege of selling them out. While it might not occur you can never tell. We have had promises from some directors whom we think a lot of, but the promises of one director are not always confirmed by his associates.

They will compulsory acquire the land – do very little with it, and in time, sell it at a huge profit.

Blue Text: *Views of Government of the day*

TOURISM CONCERNS OVER THE YEARS

1995 - 2000

Tourism is a most important industry...There is a need to revitalize the industry.

We had to recognize that the tourism industry is shifting and one way it is shifting is to the total destination resort. This resort is going to have everything in it and once wealthy people buy those places they will have to spend their money somewhere...it is happening in the Caribbean and we just cannot stand still.

BPL believes that the development of Castle Harbour as a world class resort is in the best interest of Bda, is critical to the financial viability of the Marriott Hotel and will enhance the physical attractiveness of the Resort without sacrifice to the important environmental aspects of the property.

The very reason why people visit Bermuda is in part due to the natural beauty of the island...BPL will do irreparable harm to the Bermuda image and will ultimately itself create a situation where tourists will not want to come to the congested Castle Harbour resort.

We are not against the recapitalization of our tourist industry. We just ask that our politicians use a little common sense and not be pressurized into unwise decisions that are clearly against the long term interests of Bermuda.

In 1998 Parliament was presented with a Bill which would allow BPL to sell off certain portions of the Castle Harbour Golf Course for housing, thereby fulfilling the warnings of Mr. Smith and Mr. Moore.

 **Grey Text:** *Proponents of the development*

2011

Tucker's Point should not be allowed to fail for the sake of the island's tourism industry, which is in serious need of revitalization.

The nature of tourism is changing and the type of people that come want to have something permanent. Condos can mean wealthy people have a fixed residence in Bermuda.

The area is very important environmentally...on the other hand, from a tourism perspective, it's equally important that a five star resort that is acclaimed internationally and is funded by on-Island capital is not seen to fail.

The only question here is does Bermuda want to be a world-class tourism destination or does it want to continue to slip?

Tucker's Point has kept its commitment to Bermuda and built one of the great hotels in the western hemisphere.

The SDO is an investment in Bermuda's future. It will enable the Resort to grow, expand its hospitality business and provide jobs for Bermudians.

This is a property development masquerading as a tourism development. What we have today is a misdirection play. They convinced Bermuda this is a tourism project. They had Bermuda by the throat. We can't object, we can't deny tourism.

[BEST] would be appeased by a trade-off, allowing development to take place on brownfield land more suitable for development...a precedent was set with Southlands/ Morgan's Point land swap.

 **Green Text:** *Objectors to the development proposals*

It is therefore critical, and in the long term national interest of countries, to require EIAs as a part of their process to evaluate the risks and benefits of tourism development from the perspective of the environmental, cultural, social and natural heritage. The legislative and policy regimes that regulate EIAs may differ from country to country, but the principles and methodology are similar. In the case of the TP SDO, where the developers were preoccupied with their debt and the Government seemingly focused on the demise of tourism, the EIA is a necessary mechanism to ensure adequate consideration of conservation and sustainability, especially when biodiversity is at risk.

“The business volume of tourism equals or even surpasses that of oil exports, food products or automobiles.”

(United Nations World Tourism Organization)

HOTEL CONCESSION APPLICATION GUIDELINE

The Hotel Concession Application Guideline under the Hotels Concessions Act 2000 suggests that “the rational priority” criteria for hotel development are that the project should be financially feasible and should create jobs and training opportunities for Bermudians. Developers applying for concessions (for full or partial relief or deferral of certain customs duties, land and payroll taxes and for reduction or deferral of the license fee payable in respect of the first disposition of each residential unit to non-Bermudians) must set out:

- *Projected financial statements for 5 years*
- *Previous actual expenditure including expenditure for training Bermudian employees and for local entertainment*
- *Total number of employees: breakdown to reflect the number of Bermudian employees and the number of non-Bermudian employees (which would also include non-Bermudian spouses)*
- *All training initiatives*
- *Marketing initiatives (for new tourist accommodation only; not for residential sales).*

TRENDS IN SUSTAINABLE TOURISM

Biodiversity Loss

One of the basic requirements of tourism development is land exploitation. Coastal areas have been overused and heavily urbanised. For example, out of 8,000 kilometres of Italian coastline, 43% is completely urbanised, 28% is partly urbanised and only 29% of coastline is free of construction. As a result of such exploitation, many areas have undergone dramatic change, leading to habitat loss. The loss of habitat is directly affecting rare and endangered species leading to biodiversity loss.

Such loss of biodiversity is the result of a number of different causes. Other than urbanisation and land conversion itself, biodiversity has been lost due to pollution, the increasing generation of waste, international conflicts, climate change, etc. Tourism is not the biggest or the only cause of biodiversity degradation but it can be considered as one of the most significant. In particular, this applies if it is known, as in a number of biodiversity hotspot countries (like Madagascar, Costa Rica, Belize, etc.) where rich biodiversity is the major tourism attraction. The large numbers of people visiting such places and the building of new infrastructure suitable for large quantities of visitors can affect the natural environment.

However, tourism can make significant contributions to the protection of natural resources. These benefits can include financing biodiversity conservation, in particular within established protected areas; giving economic justification to the concept of protected areas; providing economic alternatives to local people in order to reduce the exploitation of wildlife resources, and supporting biodiversity conservation efforts on an individual basis.

Integrated Coastal Management

The Integrated Coastal Management approach offers a good framework within which the principles of sustainable tourism development can be applied together with those relating to all the other relevant sectors including water, soil, energy, fishing, transportation, etc. Tools such as SEA...EIA, sustainability indicators, etc. should feature in the service of tourism planning and management ensuring that tourism development is properly integrated into overall coastal development. This is particularly true for emerging coastal destinations where tourism is very often seen as the main, if not the only vector of development, and the Small Island Developing States, characterised by an extreme vulnerability to global developments.

Source: Sustainable Coastal Tourism / An integrated planning and management approach. United Nations Environment Programme, 2009.

13: WHAT IS INADEQUATE OR MISSING BECAUSE THERE WAS NO EIA

The conditions attached to the TP SDO were crafted without the benefit of a comprehensive EIA – which would have been able to illuminate the conditions that should be attached. Five are, in fact, not conditions at all. Rather, they are requirements for studies:

- habitat survey [condition 3(a)(ii)]
- geotechnical assessment [3(a)(iii)]
- land use impact analysis [3(a)(iv)]
- subterranean topographical survey [3(b)]
- record of critical habitat or existing mature specimen endemic, native or ornamental plants [3(e)]. It is likely that the woodland vegetation retention / replacement / removal program called for by [3(a)(i)] would be based on the study conducted by [3(e)].

Our EIA expert notes: *“Studies, including surveys and other forms of environmental data collection, no doubt need to be conducted as part of an EIA, but these, by my standard, must be done in support of making predictions of the possible impacts on valued ecosystem components. They do not, in and of themselves, come anywhere close to constituting an EIA.”*

The remaining do constitute conditions on design, construction and operations re: excavation [3(c)]; water disposal [3(d)]; roads [3(f)]; run-off from roads [3(g)]; sewage disposal [3(h)]; utility trenching [3(i)]; gardening [3(j)]; and Conservation Management Plan for 5 sites [3(k)]. Far from being stringent, however there are questions about the adequacy of some of these.

For example, the condition regarding excavation and boreholes [3(c)] does not set out the drilling methods and, indeed, may not be the best test. Since the shape of caves is highly irregular in three dimensions, it is possible that caves could occur within a foot or two of the edge of a building site and still not be detected by borehole distribution. As was recently acknowledged during excavation for the new hospital, exploratory boreholes do not necessarily predict the full extent of naturally occurring voids that are a characteristic of Bermuda stone (excavations at the hospital site uncovered sand pockets that need to be removed, often by hand, and filled in with concrete). Note that the electro-magnetic technology used in the TP EIA of 1995, while effective for shallow depths, was criticized as ineffective for hills well above sea level (such as Ship’s Hill).

At least one condition [3(h)] regarding sewage treatment is, on its face, self-contradictory: there is an absolute prohibition on septic tanks, yet also an allowance for them as an alternative to connecting new residences to the existing sewage treatment plant. The evidence is that this condition was not thoroughly fleshed out before drafting. (see pg. 62 call-out)

In the absence of an EIA, the TP SDO also missed a number of considerations such as:

- tourism trend analysis to evaluate feasibility of development
- other than with respect to excavation and boreholes, there are no conditions proscribing construction methods, machinery and access (the land use impact analysis condition [3(a)(iv)] does not include the impact of temporary construction)
- provisions for ongoing monitoring and enforcement for failure to abide by the Water Resources Act 1975 or other relevant regulations
- ongoing monitoring of known caves. Note: TP has ensured that Church Cave is monitored for seepage and cracks. Glass plates installed at fault lines are monitored quarterly. An EIA would assess these results and indicate whether updated technology is recommended for ongoing monitoring
- traffic survey (in light of Motor Car Amendment [No. 2] Act 2010 – not yet in force)

- review of compliance with prior SDO conditions or analysis of whether prior SDOs had accomplished stated goals
- check-off of third party compliance. Civil servants should be aware of whether or not applicants are subject to any other Impact Analysis requirements. For example, in 2003, HSBC had adopted the Equator Principles (See Appendix VI) which are applied to new loans of US\$10 million or more as well as to *existing loan facilities where changes in scale or scope may create significant environmental and/or social impacts or significantly change the nature or degree of an existing impact*. If the SDO granted to TP brings that project into this definition, then HSBC has committed to require TP to produce a Social and Environmental Assessment
- analysis of saturation of development. Note: Maps provided to Planning did not indicate all existing development (upon which proposed development could be superimposed)
- consideration of genuine alternatives for locations, technologies and designs is an important component of an EIA. The purpose is to identify and evaluate alternative actions that accomplish development goals and still promote sustainable development.

For the TP SDO, civil servants did broach the idea of alternatives by way of design: density development (3 storeys) and changes to the golf course but were told that there were statutory restrictions on changing the “blue line” that laid out the boundaries of the golf course during the 1995 SDO. While it is true that the golf course cannot be used for any other purpose except with consent of the Legislature (a principle that harks back to 1920), it is not impossible for TP to seek legislative approval for development on part of the golf course instead of extending the footprint into protected land.

The 2008 Bermuda Plan stipulates that development on brownfield (already developed) sites is preferable to development on virgin land. The Government quarry adjacent to TP was proposed by members of the public as an alternative site. TP had expressed an interest in this site at least as early as 2000. Quarry operations ended in the late 1990s. The site now houses multiple industries, including repair shops for Government vehicles, an asphalt plant, recycling plant and asbestos storage (alarmingly, in corroded containers). It may be that the costs of moving these industries and site clean-up would be prohibitive. However, given the recent precedent of the Southlands swap, an EIA would have at least compared such costs with the long-term cost of encroachment on conservation lands.

The conditions attached to the TP SDO are clearly no substitute for a comprehensive EIA. There may be cases when an EIA suggests that no development at all should take place on sites that have been approved ‘in principle’. This would be a dilemma for developers who may have based financial projections on being able to develop all of the lots approved ‘in principle’. This could also be a deterrent to foreign investment if Bermuda becomes known as a jurisdiction that approves development that is incapable of being carried out.

In the absence of an EIA, ‘in principle’ approval is risky. The TP SDO purports to provide some comfort to the public by stipulating that certain reserved matters must be processed in the regular application process for decision by the DAB. This is thin comfort. DAB decisions on design, construction, landscaping, building height and so on do not cure the failure to obtain adequate information on the preliminary

“If the country needs a development enough to make an exception to its planning laws then it is completely reasonable and indeed responsible to require that the proposal pass financial criteria also.”

(Bermuda Resident)

question of whether development should be allowed. (This was the case of the Dockyard cruise Pier. The DAB felt compelled to approve the development because it had already started – despite grave reservations that the full range of scientific studies had not been done.)

There is considerable concern that DAB decisions regarding the reserved matters for the TP SDO can be overruled by the Minister on appeal. The Minister has the sole discretion to overrule DAB decisions – notwithstanding the contrary technical advice of the independent inspector who advises the Minister. The 2010 ruling of the Bermuda Supreme Court (see pg. 11 call-out) requires the Minister to give sufficient reasons for overruling decisions of the DAB. However, recent decisions demonstrate that the appeal process is vulnerable to public distrust. An EIA gives the word “transparency” meaning – by disclosing considerations used to make decisions (whether by the Legislature to grant a SDO, or decisions by the DAB or by the Minister on appeal).

“The important thing is never to stop questioning.”

(Albert Einstein)

TP SDO SEWAGE CONDITION

The SDO states, at paragraph 3(3)(h) that:

“all sewage treatment requirements for the residential lots to be created shall generally be met using the existing Tucker’s Point Club sewage treatment facility with cesspits and septic tanks not permitted. If in any case, connections to the sewage system are infeasible, a three-chambered semi-septic tank system will be permitted”.

This condition raises a number of questions which were not canvassed prior to the condition being drafted. As no plans for the treatment of sewage were included in the SDO application, Planning was not in a position to assess this condition. Our expert in waste management notes that a number of questions should be answered first in order to determine what conditions should be attached to the SDO:

- what does “generally” mean
- have there been independent expert tests of the existing water treatment facility
- how much additional capacity can the existing facility handle
- have there been any failures of the existing treatment facility; if so, how were they handled
- according to the 1996 EIS, wastewater processed in the treatment facility may be discharged into two “deep” injection boreholes, approximately 200 ft. deep – is this still appropriate given current technology and knowledge of risks
- is the ground water lens currently monitored

- if septic tanks are not advisable generally, why would they be an acceptable alternative if it is not feasible to connect the new development to the existing waste treatment facility
- what is the risk of leaks from the three-chambered septic tank technology
- what is the experience of septic tanks in similar karst rock / cave populated areas
- are there restrictions on where flow lines can be placed
- are there natural breaks in the flow lines? If so, what are the risks of leakages
- what are the risks of tree roots growing into flow lines
- what contingencies / protective mechanisms are or should be put into place
- what kind of ongoing monitoring should there be
- is there an enforcement mechanism should something go wrong?

Given the gravity of the risks – one drop of contaminant can compromise a whole cave lake – the conditions attached to a SDO should not be rushed and should be subjected to the lens of expert advisors. The language in the 1995 SDO was more stringent and would have been preferable in order to ensure updated scrutiny. Paragraph 3(4)(f) of the 1995 SDO states:

“the proposed means of sewage disposal, and the details of the new sewage treatment facility and the intended method of disposal of treated effluent shall be subject to the approval of the Water Authority and the Chief Environmental Health Officer and shall be designed to avoid contamination of or harm to the underlying cave system”.



Photo: Department of Communication and Information

THE MORE THINGS CHANGE:

1920s

The Company could not possibly accept conditions where they would have to come to the Legislature to petition, advertise, and bring in a private Bill and pass a special Act every time they wished to lease a bungalow or residence in the district.

After all we have got to give and take. They are going to spend an immense amount of money and in that way we must allow them some latitude.

The company has decided to apply for legislation to assist them in their object by authorizing a limited measure of compulsion in cases where owners unreasonably refuse to bargain for the sale of their lands...

The proposals will not interfere with the construction of golf links in some other part of the Colony of which your petitioners have undertaken to contribute £15,000 on certain conditions.

Now we have got a monopoly which is going to be stronger than Bermuda itself...I have been told that if the Governor was not favourably disposed towards them, they were strong enough to have him replaced from home...They are the strongest shipping firm in the world. They charge the farmers what they like now for materials imported, and what do you think they will do in the future?

Your Petitioners humbly beg to draw the attention of Your Honourable House to the practice in dealing with acquisition of lands in England...before lands can be taken from the owners without their consent, the capital of the company so acquiring the lands shall first be fully subscribed, apparently as a guarantee of good faith that the company will develop the land for the purpose for which it desires to acquire them.

Blue Text: Views of Government of the day

GOVERNMENT PROCESS CONCERNS OVER THE YEARS

1995 - 2000

The SDO was issued because parts of it extended into conservation areas...Plans for developing had been well publicized with two newspaper advertisements, a display at the Planning Dept. and a press conference by owners... Objectors had been given a standard two weeks to lodge complaints.

Once BPL has completed this environmental study, they will have to apply in the normal way to the DAB for permission to build.

I find it morally reprehensible for people to invite foreign investment and then when it comes here to move the goal posts and change the rules and make it impossible for investors to make a return.

The Bermuda Properties, they've done just about everything they can to work on both sides of the House in order to manipulate us, and what I do object to is a letter that was circulated to every member of this House: "if you don't give us what we want, we will pull out".

Fourteen days to object to this type and scale of development is unrealistic and the politicians have a moral responsibility to review this matter.

The deal with Belmont has fallen through because when they saw the deal Regency had (*to take over the former Marriott Castle Harbour property*) they asked 'what about me'?

I don't know why we spent five years discussing a planning policy if Government is going to change it overnight.

We should first use what we have and then we should re-develop where necessary before we "break new ground".

 **Grey Text:** *Proponents of the development*

2011

An amendment to the DPA 1974 [*will*] clarify that a SDO is... subject to parliamentary scrutiny, via the affirmative resolution procedure, thereby enabling the Legislature to fully consider and debate all the permissions and conditions to be attached.

The SDO simply removes restrictions on the land...final approval would only be granted if the developer satisfies the DAB that stringent conditions, as outlined in the order, have been met.

The amount of debate, and the ire with which it rages, is concerning to us...the long-term impact of such civil discourse can potentially damage the state of tourism in Bermuda, as well as create long-term damage to the Tucker's Point and Rosewood brands.


Tucker's Point stated that [*Rosewood*] would not come on-board unless the initial SDO was passed...I object to Rosewood's threats and intimidating statements.

It's very difficult to judge this compromise when you are given the order some 20 minutes before it's being debated.

And how can MPs give the SDO the time and attention needed to research the financial, economic and social ramifications in the midst of considering the most demanding debate in the Parliamentary year, the National Budget?

The public needs to have unfettered access to the professional assessments of these technical officers, hired ...by taxpayer funds...[*to*] weigh up the costs of such speculative development on lands bearing the highest possible protected status."

Any revised plan should ensure development on "less sensitive land" or building more densely on areas of Tucker's Point not protected in law.

 **Green Text:** *Objectors to the development proposals*

14: ROLE OF THE CIVIL SERVICE

In some ways, **Today's Choices – Tomorrow's Costs** is as much about the role of the civil service as it is about the proper SDO process. The two issues are intertwined – an open, cogent EIA process would insulate civil servants from public criticism that they are bureaucratic and are intimidated by Ministers.

It is common ground that *“civil servants advise, Ministers decide”*. Each Minister cannot be expected to personally have the technical expertise to evaluate all proposals. They rely on civil servants as specialists to conduct due diligence and to provide objective advice about the merits and best practices regarding situations under review. If the civil service is resourced and empowered, both Ministers and the public can have confidence in the data used to inform decisions. Certainly, the technical advice of civil servants is not sacrosanct and must be subject to and tempered by the national considerations, strategic lens and common sense that are the purview of the Ministers, Cabinet and Legislature.

Given the nature of hierarchy, it would be all too human if a kind of “constructive intimidation” is sometimes at work – a civil servant may refrain from pressing a point that is contrary to what people more senior may appear to prefer. A publication of the UK National School of Government (*“Working with Ministers”* 4th ed. 2008 C. Jary) notes: *“civil servants must ensure that ministers’ decisions are based on a firm foundation of fact. This involves setting aside our own personal views and our ministers’ and saying what, in our professional judgment, is the best course in these circumstances...We are not doing ministers (or the quality of government) any favours by telling them what they want to hear, rather than what they need to know. We have a duty to warn ministers if we feel that their decisions will not work or will produce unwanted results.”*

A comprehensive EIA process would be more transparent – revealing the concerns raised by technical officers and any (national interest or other broad) reasons why their concerns were not heeded. Especially for decisions of national priority, the public can expect to have access to a paper trail – indeed, a “logic trail” – for decisions that are contrary to the best advice of civil servants. This transparency is consistent with international best practices and the intent of the Public Access to Information Act 2010 (when operative). The appeal decision of the Supreme Court of Bermuda [BEST v. Min. of Environment (2010) SC (Bda) 44] is instructive: the Minister is now required to give sufficient reasons for overturning a DAB decision. If reasons must be given for approval of developments that are not major or national priorities, then surely reasons should be given for decisions that are national priorities.

“Every time I sit down in the situation room, every one of my advisors around there knows I expect them to give me their best assessments. And so the fact that there were some who voiced doubts about this approach was invaluable, because it meant the plan was sharper, it meant that we had thought through all of our options, it meant that when I finally did make the decision, I was making it based on the very best information.”

(Barack Obama, on the decision to locate Osama bin Laden)

“You have to be constantly receptive to bad news and then you have to act on it...If you don’t act on it, your people will eventually stop bringing bad news to your attention. And that’s the beginning of the end.”

(Bill Gates)

In the regular applications process for decision by the DAB, Planning learns of development proposals at the outset. However, SDO applications have usually started with developers approaching Ministers and/or the Cabinet first, where some understanding is reached about the overall vision of the development and its benefits. The Cabinet Office manages discussions, including presentations by the developer to the Cabinet Committee on Special Hotel Development. Tucker's Point had presented its proposals to this Committee as early as February 2010 but it was not until October 2010 that Planning was tasked with reviewing the SDO (drafted in the first instance by Tucker's Point).

In evaluating the TP SDO, Planning officers (who, in turn, consulted the Department of Conservation Services within the Ministry of Public Works) did what they could in the time available – drawing on their experience with prior SDOs and cumulative knowledge of the site. Their advice was not as complete as would have resulted from the time and input afforded by a comprehensive EIA. It must be noted that Legislators, particularly in the Senate, have emphasized that the TP SDO was an instance in which they felt very well informed and able to access direct data and question technical officers. However, as is evident from the sewage treatment condition – this was still not adequate.

Without the benefit of intra-departmental meetings, each department operated from within their own silo, advising on select slivers of the development. They were therefore not always aware of the broad promises and expectations of the developers or of the various moving parts outside of their immediate remit. The development as a whole is a goal of the Department of Tourism; a SDO is a tool of Planning; the land is a concern of the Department of Conservation Services; the impact of the development reaches the Department of Environmental Protection; the Ministry of Public Works deals with issues such as access roads, and all of these areas should be reviewed through the lens of the Sustainable Development Department. It would have made sense for these various departments to be liaising regularly – given the fact that the TP SDO was deemed a development of national priority. Even the change in Ministers, Cabinet and Permanent Secretaries midway through work on the TP SDO was reportedly not seamless. Our process expert familiar with the Bermuda civil service notes: Bermuda *“has inherited a colonial-like public service approach with individual fiefdoms. Modern public service practices seem to have by-passed Bermuda”*.

Two civil servants expressed the view that an EIA would be an additional cost that would frighten away potential investors. As the 1994 Competitiveness Commission Report (see Appendix VI) illustrates, costs have long been a concern for our tourism industry. However, what investors and developers have in unison described as the “biggest drawback” in Bermuda – even more than high costs – is our cumbersome process of moving development applications forward. They despair of having to go “cap in hand” to six or seven individual departments for guidance about rules and documentation. They plead for a streamlined, coordinated process (such as in the Bahamas) where a single team and liaison guides them from development concept through to final details in a focused and timely manner.

Civil servants can take heart that the central coordinating committee that is shepherding the new hospital development – and has prioritized intra-government, expert and public consultation – is being applauded as a possible model for all major developments going forward.

“Developers prefer clear government policies, even if they are stringent, to trying to traverse vague policies and deal with inept or corrupt bureaucrats.”

(David Wickline, leading luxury resort developer, quoted in *Global Trends in Coastal Tourism* 2007)

15: CONCLUSION

At the launch of this investigation, a senior civil servant told me that *“there is no value to this investigation”*. What do you think?

Is there a value for the credibility of Bermuda for us to be aware of the international obligations we have signed on to and the common law that governs us? If Bermuda does not adhere to international law, then that should be a choice that we account for, not because we have mistaken our responsibilities.

Is there a value to being aware of international standards, best practices and processes that guide civil servants elsewhere in the world? While we are not bound by international norms, “good governance” can only be a slogan if we ignore international best practices, especially in the complex matter of balancing the environment with development.

Should taxpayers expect civil servants to be properly deployed and resourced to gather and analyze all relevant facts – environmental, historical, social and financial? Do we have a right to know what information the civil servants did or did not know with respect to the Tucker’s Point Special Development Order? Our EIA expert notes *“It is clear that the officials serving the Minister responsible for the environment in Bermuda are concerned about environmental issues in view of the proposed development. If they were not, provisions for specific environmental studies...for the development would not have been specified in the SDO.”* Should the civil servants have had more time and access to financial analysis and other expertise in order to formulate their advice?

Is it not critical for us to understand that a less than optimal fact-gathering and evaluation process cannot be cured by an improved decision-making procedure (the amendment to the DPA).

Is there a value in learning that investors are not necessarily frightened away by a country’s concern for the environment or by the reasonable rules that are commonplace around the world, such as the requirement for an EIA? Is it important for developers themselves to identify risks and ways to mitigate them in order to develop better tourism products?

Is there a value to learning about models for cogent, respectful ways to share differences of opinion? The Tucker’s Point Special Development Order debate descended to personal demonization on one side and disdain on the other. People were so engrossed in advocating their positions; they found it difficult to listen to each other. As important as emotion is to each of us as a human being is it valuable to devise a process through which evidence and standards also contribute to debate on matters of national priority?

Do substance and merits have value? **Today’s Choices – Tomorrow’s Costs** answers a question put to me early in this investigation: “what’s the big deal about the Yellowwood trees?” Is there value to having access to the science in layman’s terms? Is it not fair and proper for the civil service to set out – through a neutral rather than confrontational lens – just how fragile our environment is and what aspects are of global, not merely national significance? Bermuda is committed to holding the Yellowwoods, Diamondback Terrapin, Killifish and other species in trust for all of humanity. In turn, Bermudians often travel to enjoy species and habitats held in trust for humanity by overseas countries.

*“I am working to make sure we don’t only protect the environment,
we also improve governance.”*

(Wangari Maathai, Nobel Peace Prize Laureate)

Is there value in searching for more efficient ways to join government up rather than being satisfied with departments operating in silos? Should major development proposals have the benefit of alignment with the Bermuda Plan 2008, the Biodiversity Strategy, the Sustainable Development Strategy and Implementation Plan 2005 and the National Tourism Strategy (when done)?

Rather than an excuse for partisanship and confrontation, can applications for Special Development Orders present us with opportunities to consider our short-term versus long-term values? What is the Bermuda that we want to bequeath to our grandchildren? Are there limits to growth in our 21 square miles? Must there be a conflict between nature and jobs? Where is our tipping point?

Is there a value to understanding how our governance may impact on the UK's obligation to account for Bermuda's natural life under the Biodiversity Convention and the UN Committee on Decolonization?

As I conclude this Report, I must note that there remains an elephant in the room. There are members of the public who believe that something untoward went on with the Tucker's Point SDO: *"so and so owns a unit there...was wined and dined...is related to...is being protected...did money change hands?"*. I have uncovered no evidence to support such suspicions of corruption. If I had, the Ombudsman Act 2004 requires me to refer the matter to a more appropriate authority (such as the police). What I do know is how strongly perceptions can become reality and how suspicion and distrust do forcefully flood in to fill gaps in information.

There was a level of concern that seemed to penetrate the public well beyond the environmental movement that spearheaded the Southlands protests. I was surprised by the number of people who approached me in the streets or at events to say how happy they were about this investigation: *"there was a sigh of relief in our office...lots of people are behind you...we hope you can get to the bottom of this...what a good thing that there is an office that can look into this...thank-you."* These were not activists who write letters to editors, or blog, or flood the emails of Legislators. They were ordinary dads and nanas; they work in local and international business; they span the political spectrum; some are retired teachers and even civil servants. Most were Bermudian and black. Less than a handful could be identified as "environmentalists". They all simply reflected the disquiet of not knowing – was the Tucker's Point Special Development Order justified?

There is value in transparency. A proper process would certainly have muted suspicions, or made it difficult for them to gain a foothold. An EIA process that: fairly balances long term and short term priorities; realistically assesses risks and genuinely explores mitigation; reasonably discloses the business case for SDOs (as in the Bahamas, see pg. 14); and, ensures respectful avenues for public consultation (as is best practice all over the world) would have gone a long way toward dispelling animosity and fostering public trust.

I find maladministration in:

- the collective failure of due diligence to determine applicable law, international standards and best practice relevant to a decision of national priority
- a resulting failure of process (including proper public consultation) to gather and analyze all considerations relevant to providing advice to decision-makers.

*"The moment we break faith with one another,
the sea engulfs us and the light goes out."*

(James Baldwin)

RECOMMENDATIONS

In accordance with section 16(1) of the Ombudsman Act 2004, I request the Secretary to the Cabinet/Head of the Civil Service and/or the Permanent Secretaries for the Ministry of the Environment, Planning and Infrastructure Strategy and the Ministry of Public Works to notify me, in writing, of the action (a) that has been taken or (b) is proposed to give effect to the recommendations or (c) reasons for failure to implement the recommendations, if no action is proposed.

Pursuant to section 16(2) of the Act, I hereby extend the period for the notification under section 16 to Tuesday, 1st May, 2012.

16: RECOMMENDATIONS

The Secretary to the Cabinet/Head of the Civil Service and/or the Permanent Secretaries for the Ministry of the Environment, Planning and Infrastructure Strategy and the Ministry of Public Works (as appropriate) should deploy persons and resources to ensure:

1 Review of Law

- a Review of relevant international obligations that bind Bermuda ¹
- b Follow-up with the Government of the UK regarding its obligations under the UK Environment Charter, specifically
 - (i) Facilitate extension of UK's ratification of Multilateral Environmental Agreements of benefit to Bermuda
 - (ii) Invite Bermuda to participate in the UK's delegation to international environmental negotiations and conferences
 - (iii) Use UK, regional and local expertise to give advice and improve knowledge of technical and scientific issues
 - (iv) Use the existing Environmental Fund for the Overseas Territories, and promote projects of lasting benefit to Bermuda
- c Update the Ramsar Convention list to include Mangrove Lake and Trott's Pond at TP and other wetlands throughout Bermuda
- d Conduct a scientific study of the value of Paynter's Hill and Catchment Hill for migratory birds; determine and facilitate any regional agreements that Bermuda should enter into under the Convention on Migratory Species
- e List the graveyard as an Historic Building under s. 30 of the DPA (Although already referenced under s. 31 as an Historic Protection Area, a s. 30 listing would add status and an extra layer of protection)
- f Conduct required surveys to complete and perfect donation by TP

2 EIA is done for all developments that are major or likely to have significant adverse impact on the environment:

- a Scoping and analysis
 - (i) Review and redraft GN106 in accordance with legal obligation; Biodiversity Convention guidelines
 - (ii) Determine deadlines and set out clear guidelines for developers
 - (iii) Determine which up to date analytical and digital tools will be deployed (including up to date maps to show cumulative impact of proposal on existing development)
- b Public consultation
 - (i) Define and include immediately affected and broadly affected stakeholders
 - (ii) Ensure qualified facilitation (methodology goes beyond chairing meetings); and accessibility to documents such as EIAs

¹ This is not the first time that I have urged departments of the Government to take international law into account:

3rd Annual Report 2008: I recommended that the Human Rights Commission "*avail itself of databases and other sources of leading case law from the European Court of Human Rights... While not binding, such resources are useful to reinforce learning and analysis about the principles and specific guidelines relating to the work of national human rights institutions.*" The Human Rights Commission agreed.

5th Annual Report 2010: I recommended that the Marriage Act 1944 be reviewed for compliance with international law and even with the Constitution of Bermuda. Only persons of the Christian, Jewish, Muslim and Baha'i Faiths have a right to marry in accordance with their religious rites (the latter three through individual Acts). Persons of other faiths must legalize marriage through civilian ceremonies: "*The Legislature of 1944 did not envision or anticipate a Bermuda of 2010 with persons here from all over the world bringing such a diversity of cultures, traditions and beliefs.*" The Registrar General responded that this would be reviewed once the Law Reform Commission is established (not yet implemented).

- c Compatibility review of relevant regulations (see Preliminary Checklist Template, pg. 72)
(Note, for example: in the UK, before the Second Reading of any Bill, the Minister Responsible must make a statement to the effect that provisions of the Bill are compatible with the European Convention on Human Rights)
- d Financial feasibility studies and disclosure of projections (taking into account any revisions in scope of project)
- e Due diligence regarding developer's track record, prior compliance and third party compliance

3 EIS is submitted for public consultation by

- a Developer, setting out
 - (i) Third party compliance e.g. Equator Principles
 - (ii) Why alternatives / mitigation is or is not feasible
- b Government, stating
 - (i) Response to technical advice
 - (ii) Declaration of interest

4 “Joined up” Civil Service involves all relevant departments; note role of the Sustainable Development Department

- a Analyze what works and what is scalable or transferable from the experience of the new hospital development central coordinating committee
- b Determine early triggers for informing relevant departments of applications / presentations to the Cabinet Committee on Special Hotel Development – Form central coordinating committee, developer liaison and central file
- c Review of proposals proceeds from broad principles to details (so that developers are not bogged down with extraneous details and reports before broad guidance and agreement are secured)
- d Coordinate responsibility for monitoring and enforcement of SDO conditions

5 Access to Best Practices, Research and Training on an ongoing basis

- a Determine affiliate or observer status and potential obligations, benefits and training opportunities in, for example
 - (i) CARICOM (Bermuda is an Associate Member)
 - (ii) United Nations World Tourism Organization
 - (iii) Alliance of Small Island States (“ASOIS”): Non independent islands are eligible to apply for observer status. The Secretary to the Cabinet would need to confirm whether Bermuda must apply through the UK Foreign and Commonwealth Office (Bermuda may apply through the CARICOM caucus at the United Nations).
- b Survey, keep up to date and determine relevance to Bermuda of “green” initiatives such as
 - (i) LEED certification (note: the ACE building in Hamilton, Bermuda is LEED certified at the Gold level)
 - (ii) Research relevance and feasibility of long-term land banks (e.g. Martha’s Vineyard and the Land for Maine’s Future)

6 Next Development Plan consultative process should consider

- a Zoning, policies and standards should take into account changes in tourism development models
- b Conditions / level of stringency of zoning for lands where conservation protection is removed
- c Undertakings to ensure that lands donated for conservation purposes cannot be rezoned for development

PRELIMINARY CHECKLIST TEMPLATE – Determine alignment, compliance or requirements for EIA:

• **Local**

(by team – developers should not have to do this with individual departments)

- Water Resources Act
- Protected Species Act
- Clean Air Act
- Sustainable Development Strategy and Action Plan
- Biodiversity Strategy
- Tourism National Strategy (when done)
- Labour Needs alignment
- Risks (environmental, social, cultural)
- Alternatives (e.g. to site, design, engineering, density)
- Tree Preservation Order
- Additional surveys – traffic / waste
- Domino effects and costs
- Short term / long term assessment of benefits and costs
- Enforcement mechanisms and conditions

• **International**

- UK Charter
- Rio Declaration
- Ramsar Convention
- CARICOM
- AOSIS
- Convention on Migratory Species
- Global Trends and Best Practices

“Faced with the choice between changing one’s own mind and proving there is no need to do so, almost everyone gets busy with the proof”

(John Kenneth Galbraith)

A P P E N D I X I

**NOTE ON
OMBUDSMAN'S JURISDICTION**

The Ombudsman for Bermuda's
Systemic Investigation into the Process
and Scope of Analysis for
Special Development Orders

*(pursuant to s. 5(2)(b) and s. 24(2)(a) and (3)
of the Ombudsman Act 2004)*

Ombudsman's Jurisdiction

An “own motion” investigation is appropriate when: complex issues are debated in the public domain; informal resolution is not possible; public distrust is ongoing. Except for judicial review, the Ombudsman is the only independent institution authorized to resolve the issues.

The challenge to my jurisdiction to conduct this investigation was based on the theory of Ministerial Responsibility. This principle was articulated in a side comment (*obiter dicta*, in legalese) in a 1943 UK case [Carltona Ltd. v. Commissioner of Works (1943) 2 All ER 560] that says that Ministers must answer to the Legislature for the actions of civil servants. This is entirely logical as each civil servant cannot be expected to be hauled into Parliament to explain their actions. This guards against Ministers claiming ignorance of untoward actions within their Ministries.

Civil servants had gathered information for the TP SDO at the request of the Minister for the Environment, Planning and Infrastructure Strategy. The challenge asserted that, as I cannot investigate the administrative actions of the Cabinet and Ministers, then I also cannot investigate the actions of civil servants that are intended to advise the Minister and Cabinet. Taken to its logical extreme, this would remove most actions of the civil service from oversight by the Ombudsman. The concept of Ministerial Responsibility cannot reasonably be evoked to prevent the very purpose and practice of the Ombudsman institution worldwide. As an Officer of the Constitution and of Parliament, the Ombudsman acts as an independent set of eyes and ears to account to the Legislature for the public sector.

In any event the very plain words of sections 2 and 3 of the Ombudsman Act 2004 (“the Act”) specify:

2 (2) *“Any reference in this Act to an authority includes a reference to the officers and employees of that authority”*

3 *“This Act applies to the following authorities: (a) government departments; (b) public authorities; (c) Government boards; and (d) any other corporation or body (i) which is established by Act of the Legislature or in any other manner by a Minister; or (ii) whose revenues derive directly from money provided by the Legislature or a fee or charge of any other description authorised by the Legislature.”*

It was also asserted that witnesses could provide to me only such information that is already or could be in the public domain. Again, this notion flies in the face of the purpose and clear words of the Act as well as Commonwealth jurisprudence. By creating the role of an Ombudsman, it is the intention of the Legislature that witnesses cooperate in investigations. Not only does the Act not limit information that can be disclosed to me, but it explicitly allows information to be disclosed to me that might be subject to statutory or other obligations of non-disclosure:

14 (2) *“Compliance with any requirement of the Ombudsman under s. 13 [to provide information] (a) is not a breach of any relevant obligation of secrecy or non-disclosure, or of the enactment or provision by which that obligation is imposed.”*

Thus, the UK Official Secrets Act 1989 by which Bermuda’s civil servants are bound is not breached by cooperation with my requests for information. Indeed, Commonwealth jurisprudence has held that the Ombudsman may be able to obtain information that is not discoverable in the Courts. Moreover, I may certify to the Supreme Court that any persons, including civil servants, who omit information or otherwise obstruct my investigations, have committed the offence of contempt. The only information that lawfully cannot be disclosed to the Ombudsman is set out in s. 13 of the Act, principally related to national security, investigations of crime and Cabinet deliberations. The Secretary to the Cabinet may certify that certain information relates to Cabinet deliberations.

Late in the investigation, one private entity apparently took the view that – as I cannot investigate private entities – then I cannot gather evidence from them. Again, this flies in the face of the function of the Ombudsman to collect all relevant evidence, decades of Commonwealth jurisprudence and even the actual words of the Act:

Section 12(2)(b): the Ombudsman *“may obtain information from such persons, and in the manner, he considers appropriate”.*

By s.13 of the Act:

- (1)** *“Subject to this Act, for the purposes of an investigation the Ombudsman –*
 - (a) may require any officer or member of the authority that is the subject of the investigation, the complainant or any other person who is in [her] opinion able to provide information or produce documents relevant to the investigation to give such information or produce such documents; and*
 - (b) may summon before [her] and examine on oath or affirmation any person referred to in paragraph (a).*
- (2)** *For the purposes of such investigation, the Ombudsman shall have the same powers as the Court in so far as those powers relate to the attendance and examination of persons (including the administration of oaths or affirmations) and in respect of the production of documents.*
- (3)** *The Ombudsman shall not require –*
 - (a) any person to furnish any information or answer any question –*
 - (i) relating to proceedings or deliberations of the Cabinet or any committee of the Cabinet;*
 - (ii) that might prejudice the security, defence or international relations of Bermuda; or*
 - (iii) that might prejudice the investigation or detection of offences;*
 - (b) any person to produce so much of any document as relates to such proceedings or that might prejudice the matters mentioned in paragraph (a);*
 - (c) any Minister or Junior Minister to furnish any information or answer any question.*
- (4)** *For the purposes of subsection (3)(a)(i) a certificate by the Secretary to the Cabinet with the approval of the Premier and certifying that any information, question, document or part of a document so relates shall be conclusive.”*

Section 14 of the Act provides:

- (1)** *“Every person shall have the same privileges in relation to the giving of information to the Ombudsman, the answering of questions put by the Ombudsman, and the production of documents and things to the Ombudsman, as witnesses have in the Court.*
- (2)** *Compliance with any requirement of the Ombudsman under s.13 –*
 - (a) is not a breach of any relevant obligation of secrecy or non-disclosure, or of the enactment or provision by which that obligation is imposed; and*
 - (b) no person shall be liable to prosecution for an offence against any enactment by reason only of that person’s compliance with any requirement of the Ombudsman under that section.*
- (3)** *Except in proceedings for perjury within the meaning of the Criminal Code in respect of sworn testimony given by a person before the Ombudsman, or for an offence against s.25 or 26 –*
 - (a) no statement made or answer given by any person in the course of any investigation by or proceedings before the Ombudsman shall be admissible in evidence against that or any other person in any court or in any inquiry or other proceedings; and*
 - (b) no evidence in respect of proceedings before the Ombudsman shall be given against any person.”*

In essence, the legal construction of Ombudsman statutes requires that limits on the Ombudsman’s jurisdiction should not be read in or implied in the absence of express language. The words of Ombudsman statutes must be construed broadly and purposively. The purpose of the Ombudsman is to improve public administration and increase its accountability. Accordingly, the powers of the Ombudsman are beneficial provisions designed in the public interest (including obtaining evidence from any source).

A P P E N D I X I I

L I S T O F S D O s / S P E C I A L A C T S
1 9 7 8 - 2 0 1 1

The Ombudsman for Bermuda's
Systemic Investigation into the Process
and Scope of Analysis for
Special Development Orders

*(pursuant to s. 5(2)(b) and s. 24(2)(a) and (3)
of the Ombudsman Act 2004)*

Year	SDO Title	BR or GN	Related Planning/Building or Subdivision Applications	EIA or EIS submitted	Comments
SPP	1978 The Stomington (Special Planning Provision) Act	BR 57			To build Bermuda College; woodland and arable zoning restrictions lifted. There were public objections
SDO# 1	1980 Evans Green Lot C Development Order	BR 82	ZO #28		To change use to a guest house
	1981 Tamarind Vale (Lots 17 and 18) Development Order	BR 51	ZO #1		To register Subdivision
	1982 Somerset Bridge Apartments Development Order	BR 1	Unable to locate any files		To allow additional apartments and a quarrying operation. National Trust concerned
	1983 Granway Heights, Southampton Parish, Lot 15 Development Order	BR 42	ZO #24		To allow development (in contravention of zoning order provisions)
SPP	1983 The Fort Langton (Special Planning Provision) Act	BR 60			To build Government bus garage; public hearing 1975/76
SPP	1984 The Tynes Bay (Special Planning Provision) Act	BR 56		Yes - EIA	To build Government waste treatment facility
SDO# 2	1984 Fentons Drive, Middletown General Improvement Area, Pembroke Development Order	BR 39	P12362		To turn Anglican Synod parish lands back to Government
SDO# 3	1984 Middletown Road, (Corner site), Middletown General Improvement Area, Pembroke Development Order	BR 40	P12362A		To turn Anglican Synod parish lands back to Government
SPP	1985 The Ireland Island North (Special Planning Provision) Act	BR 29			To build Government prison; public comment
SDO# 4	1985 Tucker (North Shore, St. Georges) Development Order	BR 662	P7772A		
SDO# 5	1986 Coney Island (Fisheries Facilities) Development Order	BR 36	P14752		To allow Commercial Government development. Adaptation of existing buildings Change of Use
SDO# 6	1988 Ireland Island South Nursery School Development Order	BR 18	P16469		To allow development - used existing building/interior encroachment to turn woodland into play area
SDO# 7	1988 Crown Hill (United States Consulate) Development Order	BR 67	B17294A		To expedite (US Bases and sites exempt from zoning)
SDO# 8	1988 Rockaway Development Order	BR 81	B18233		To eliminate red tape for residential development (not originally zoned)
SDO# 9	1989 15 Point Finger Road Development Order	BR 1	Unable to locate any files		To allow change in use - residential to commercial
SDO# 10	1989 Subdivision Registration Special Development Order	BR 26	S/389 S/542 S1153 S1362 S1722		To grandfather pre-existing subdivisions in Registration System
SDO# 11	1989 Bermuda Biological Station SDO	BR 38	P17466		To expedite improvements on periphery buildings
SDO# 12	1989 Mount Langton (Pembroke Parish) SDO	BR 39	P18513A, B18513A		To change use from Tourism to Residential. Note: only after SDO was granted was it realized that SDO had granted permission for more units than could physically fit on site. No public consultation
SDO# 13	1990 South Road, Warwick SDO	BR 44	P19428, B19428A		To build hotel (expired)
SDO# 14	St. Paul's African Methodist Episcopal Church, (Parson's Road Pembroke Parish)	BR 45	S1899 shows relevant lots		To register subdivision
SDO# 15	1990 South Road, Warwick (No.2) SDO	BR 49	P19428, B19428A		To build Hotel and Residential
SDO# 16	1990 17 Point Finger Road, Paget Parish Special Development Order	BR 50	P19244		To allow change in use
SDO# 17	1991 South Road, Warwick, Special Development Order	BR 10	P19428, B19428A		Cliffs soft hurricane erosion and flood risk, 3 meters per decade
SDO# 18	1992 North Shore Road, Devonshire Parish Special Development Order	BR 44	B0335/93		
SDO# 19	1993 St. John's Church, Pembroke Parish, SDO	BR 44	P18639A, B0152/93		To build Sunday school
SDO# 20	1995 Castle Harbour Resort, Hamilton Parish SDO	BR 484	P0543/95	Yes - EIA and Cave Survey	Masterplan - in principle approval for resort including residential development of Ships Hill and Shell Point Road. Sweeping rezoning but lower slopes woodland.

Year	SDO Title	BR or GN	Related Planning/Building or Subdivision Applications	EIA or EIS submitted	Comments
SDO#21	1997	Development and Planning (Rocky Heights Quarry) SDO	BR 57	S34 #110	To subdivide, expedite processing plant and ameliorate impact on neighbouring land; also s.34 agreement
SDO#22	1997	Bermuda Equestrian Centre (Vesey Street Devonshire) SDO	BR 64	P08359/97	To excavate and develop an open space zone. Public notice invited comments. As a result of public comment - radically modified - about 2 acres of woodland on west destroyed (could not be seen from Middle Road)
SDO#23	1999	Destination Villages (Daniel's Head, Sandys Parish) SDO	BR 3	P0415/98, B0991/99	To allow different building construction methods and materials
SDO#24	1999	Berkeley Institute (Pembroke Parish) SDO	BR 4	P0843/98, B0801/00	To allow 5 storeys and minor encroachments - overseas company did Environmental Impact Assessment. Over an acre of Woodland destroyed, 3 acres of hills protected. Public comment. House had architectural interest/National Trust consulted. Photo documented and original beams salvaged.
SDO#25	1999	Elbow Beach (Golf Club and Villas, Belmont Hotel Property, Warwick Parish) SDO	BR 25	P09359/98	To allow encroachment on narrow hillside area only
SDO#26	2000	Subdivision (Lots 63 and 76, Happy Valley Road, Pembroke Parish) SDO	GN 918	S3502	To register subdivision
SDO#27	2001	Tucker's Point Club Hotel and Spa (St. George's Parish) SDO	BR 36	P0050/01	To rebuild hotel and realign roads (zone lifted in 1995)
SDO#28	2001	Harbour Court, Tucker's Point Club (St. George's Parish) SDO	BR 72	P0650/00	To lift zoning for hotel, residential units and underground parking
SDO#29	2002	Belmont Hills Golf Club, Hotel and Villas (Warwick Parish) SDO	BR 46	S0049/02, P0517/02, B0214/03	To increase density, no environmental impact to change hotel use
SDO#30	2003	Residential Treatment Facility, (Aeolia Drive) (Devonshire Parish)	BR 4	P0496/02	To create purpose built residence, recreation and roadways - impact on degraded Secondary woodland
SDO#31	2003	Pembroke Hamilton Club Redevelopment (Middle Road) Warwick Parish-Special Development Order	BR 5	S0075/02, P0233/02	To change portion from recreational and open space to commercial use.
SDO#32	2003	Sonesta Beach Hotel Resort Property (Southampton Parish) SDO	BR 31	P0945/02	To allow some encroachment on protected hillside/already zoned for tourism. Did not happen. Would have been development of under 2 acres of intact open space/saturation development. Hurricane flood zone
SDO#33	2004	Belmont Hills Golf Club, Hotel and Villas (Warwick Parish) SDO	BR 37	P0921/03	To change use, urgent time constraints/ Saturation development
SDO#34	2004	Newshead Hotel (Paget Parish) SDO	BR 38	P0920/03, B0936/04	To build hotel and amenities and to allow change in use for underground sewage treatment plant / Saturation development
SDO#35	2004	Cliffs Resort Hotel and Residential Development (Warwick Parish) SDO	BR 39	S0071/03 P0722/03	To build/ Public process and objections
SDO#36	2004	Bermuda Homes for People Southside Housing and Village (St George's Parish) SDO	BR 70	S0106/04, P0692/04, B0001/08	To expedite process/linked to Sonesta/Wyndham/ Old Baseland redevelopment/already degraded land
SDO#37	2005	Manufactured Homes Housing Project (Sandys Parish) SDO	BR 51	B1224/05	To allow emergency construction. Rockaway - an acre of zoned woodland lost. Baselands did not have zoning
SDO#38	2006	Loughlands Residential Development & Paget Day Care Facility (Paget Parish) SDO	BR 65	B0973/06	To allow density and design (original building was designated as historical)
SDO#39	2006	Southampton Beach Resort Ltd (Southampton Parish) SDO	BR 70	P0945/02	Saturated development
SDO#40	2006	Ritz Carlton Hotel & Residences Par-la-ville Park (City of Hamilton) SDO	GN463/2006	P0869/06 Bda Laws as Par-la-ville hotel	To build hotel, townhouses and luxury homes/linked to Bda Homes (SDO#36)
SDO#40	2006	Par-La-Ville Hotel & Residences SDO 2006 (amended version of Ritz Carlton SDO)	BR 83	P0869/06	To build public process and objections
SDO#41	2007	Southlands Resort Development (Warwick Parish) Draft SDO	BR 14	P1029/06	To build resort and residential units and divert road. Started as regular application; Draft SDO; Application withdrawn after public protest. Swap negotiated with Morgan's Point brownfield.

Year	SDO Title	BR or GN	Related Planning/Building or Subdivision Applications	EIA or EIS submitted	Comments
SDO#42	2007	Grand Atlantic Resort & Residences (Warwick Parish) SDO	GN396/2007	P0994/06, B0373/10	To build hotel, fractional units and affordable housing. Cut roads down to beach/seawall – published. Wind tunnel/potential hurricane flood zone.
SDO#43	2007	Bermuda Housing Corp. Harbour View Village (St. Georges Parish) SDO	GN254/2008	P0692/04, B0001/08	To allow density development/ Convict Bay ?
SDO#44	2008	Coco Reef Resort (Piguet Parish) SDO	GN78/2008	P0878/06	To change use to 66 luxury units. No conservation evaluation. Encroached on woodland and coastline. Hurricane flood potential.
SDO#45	2008	Stonehaven Development Condominium Hotel (City of Hamilton) SDO	GN254/2008	P0577/07	Traffic Study
SDO#46	2009	Fairmont Southampton Resort Master Plan (Southampton Parish) SDO		P0518/08	Open space – early coastal fort
SDO#47		Number skipped in Department of Planning database			
SDO#42	2009	Grand Atlantic Resort & Residences (Warwick Parish) SDO	GN 448/2009	B0373/10	To change use from hotel to affordable housing. Reduce setback from road required when height more than 2 storeys. Concerns about architectural merit and landscape plan
SDO#48	2009	Bermuda Electric Light Company Power Station GT6-9 Gas Turbine Replacement (Pembroke Parish) SDO	GN449/2009	P0250/09, B0466/09	Yes EIA and EIS
SDO#40	2009	Ritz Carlton Hotel & Residences Par-la-ville Car Park (City of Hamilton) Special Development Amendment Order	GN476/2009	P0869/06	To expedite time-sensitive installation to maintain reliable, safe and environmentally responsible electrical power for reasons of national importance. No zoning issues, Comprehensive
SDO#49	2010	Victoria Place Rental Homes (Ireland Island, Sandys Parish) SDO	GN 914/10		
SDO#50	2010	9 Beaches (Daniel's Head, Sandys Parish) Order	GN1099/10		
SDO#51	2011	Tuckers Point Resort (Hamilton and St. George's Parishes) SDO	BR 20/11		To lift zoning protection to enable fractional and residential development. Size and uniqueness of habitat – saturation development.
		BR = Bermuda Regulation GN = Government Notice			

Note: Items in green letters denote SDOs that entailed encroachment on protected areas. (Change in use without encroachment not listed in green letters)

Although not a SDO, the **Park Hyatt (St. George's) Resort Act 2008** effectively accomplishes the same kind of development approval as a SDO. This Special Act of the Legislature grants permission "for the promotion of the public benefit and economic wellbeing of Bermuda". Approval was granted to subdivide, lease land and build hotel, fractional units, golf course, staff housing and infrastructure (including sewage treatment and water desalination plants). Comprehensive land use planning study submitted with application to demonstrate mitigation measures – included flora and fauna study, traffic study, marine study, ground/waste and sewage water, historic heritage and socio economic assessment
King Edward Memorial Hospital(Special Planning Provision) Act 2009 – Redevelopment of hospital – Act required land use study to include traffic study, visual impact study, construction phases, mitigation of noise,dust and traffic, wastewater and water supply

A P P E N D I X I I I

**S M A L L I S L A N D
D E V E L O P I N G S T A T E S R E S E A R C H**

The Ombudsman for Bermuda's
Systemic Investigation into the Process
and Scope of Analysis for
Special Development Orders

*(pursuant to s. 5(2)(b) and s. 24(2)(a) and (3)
of the Ombudsman Act 2004)*

Biodiversity Indicators, Ecosystem Services and Local Livelihoods in Small Island Developing States: Early Warnings of Biodiversity Change

In this study released in July 2010, the authors state: Small Island Developing States (“SIDS”) generally share a number of economic and environmental characteristics that combine to make them good advance indicators both of biodiversity change and the human consequences of that change (*Teelucksingh and Nunes 2010, Ghermandi et al. 2010*). The underlying characteristic of SIDS is that of vulnerability. Small populations are coupled with high population densities, concentrated in coastal zones that comprise much of the land area. An inevitably high ratio of coastal to total land area means that island ecosystems are characterized by highly coupled terrestrial and marine ecosystems (*McElroy et al. 1990*). They are also known to be extremely vulnerable to environmental degradation (*van Beukering et al. 2007*), both in terms of indigenous ecosystem change, as well as exogenous environmental shifts. There is a heavy reliance on natural resource exploitation, with many of the SIDS being “monocrop”, tourism-oriented economies, SIDS are amongst the sites where biodiversity is most threatened (*Global Environment Outlook 2003*). [Sonja S. Teelucksingh and Charles Perrings 2010, *Biodiversity Indicators, Ecosystem Services and Local Livelihoods in Small Island Developing States (SIDS): Early Warnings of Biodiversity Change*, UNEP Ecosystem Services Economics Working Papers, Nairobi, UNEP]

The Alliance of Small Island States (“AOSIS”) is a coalition of small island and low-lying coastal countries that are vulnerable to the adverse effects of global climate change. AOSIS is the ad hoc lobby and negotiating voice for SIDS within the United Nations. AOSIS has a membership of 42 states and observers (37 of whom are members of the UN). Non independent countries such as Bermuda are eligible to apply for observer status in AOSIS.

The 2007 report (confirmed at the 2011 Climate Change Conference) of the *Inter-Government Panel on Climate Change* notes that SIDS are particularly at risk to climate change impacts due to their geographic isolation, small size, and often low adaptive capacity. Many life-sustaining ecosystems such as coral reefs may already be suffering irreversible damage. This has severe socioeconomic implications for water resources, biodiversity, fisheries, agriculture, energy access, health, tourism, and infrastructure. Ecosystem approaches to adaptation, for example, the preservation and restoration of coastal ecosystems and natural buffers, must be promoted especially through established integrated coastal and ocean management institutions in order to increase the resilience of coastal and marine systems and mitigate adverse impacts of climate change.

EPPCA OF ZAMBIA

In addition to public consultation and environmental impact, EIAs should survey compliance requirements with all relevant local and international law. Even in developing countries with very limited resources, compliance with international obligations is a serious matter.

For example, an application to launch a lion rehabilitation program in Zambia required that the EIA, conducted pursuant to the Environmental Protection and Pollution Control Act 1990, consider “all aspects” of current Zambian legislation appropriate to proposed activities including: the National Heritage Conservation Act 1989, the Water Act 1949, the Zambia Wildlife Act 1998, the

Forestry Act 1999, the Land Act 1995, the Public Health Act 1930, the Zambezi River Authority Act 1987, the Investment Act 1993, the Tourism Act 1979 (amended 1985), the local Government Act 1991, the Town & Country Planning Act 1962, the Plumage Birds Protection Act 1915, the Natural Resource Conservation Act 1970, and the Land Conversion of Title Act 1975 (amended 1990); as well as the international standards set down by the Conventions on Biodiversity 1992; World Cultural and National Heritage 1975; International Trade in Endangered Species 1973; Convention to Combat Desertification 1994 and by the IUCN Species Survival Commission and the World Wildlife Fund.

Press Release issued jointly by Alert (Zambia), Lion Encounter (Zambia), Lion Encounter (Zimbabwe) & Antelope Park, 16 Feb 2009

A P P E N D I X I V

**R A M S A R L I S T I N G O F
W E T L A N D S I N B E R M U D A**

The Ombudsman for Bermuda's
Systemic Investigation into the Process
and Scope of Analysis for
Special Development Orders

*(pursuant to s. 5(2)(b) and s. 24(2)(a) and (3)
of the Ombudsman Act 2004)*

The Ramsar List of Wetlands of International Importance, according to Article 2 of the treaty text, is the keystone of the Ramsar Convention. The chief objective of the List is to “develop and maintain an international network of wetlands which are important for the conservation of global biological diversity and for sustaining human life through the maintenance of their ecosystem components, processes and benefits/services”. The list of Wetlands of International Importance for Bermuda is found toward the end of the UK listing, under Overseas Territories. Of the sixteen listed wetlands for all of the UK Overseas Territories, seven are in Bermuda:

Hungry Bay Mangrove Swamp. 11/05/99; Bermuda; 2 ha; 32°16'N 064°45'W. Nature Reserve. A tidal mangrove swamp (Bermuda's largest) in a shallow sea bay with a relatively narrow opening to the sea. It has the longest continuous sequence of mangrove peat layers in the Atlantic. The site supports important populations of endangered native crabs (*Cardisoma guanhumii*, *Cenobita clypeata*), crustacean species, and wintering birds (*Nyctanassa violacea*, *Ceryle alcyon*). Tidal channels are used for boat traffic. Ramsar site no. 987. Most recent RIS information: 1999.

Lover's Lake Nature Reserve. 11/05/99; Bermuda; 2 ha; 32°21'N 064°42'W. A 2m-deep lake fringed with predominantly black mangroves. The water level is tidal and rises and falls via subterranean channels. The site is important for an endemic Killifish (*Fundulus relictus*) and both wintering and passage waterfowls, (especially *Podilymbus podiceps* and *Ceryle alcyon*). Ramsar site no. 989. Most recent RIS information: 1999.

Paget Marsh. 11/05/99; Bermuda; 11 ha; 32°16'N 064°46'W. The largest surviving remnant of Bermuda's pre-colonial swamp forest inclusive of mangrove swamp with *Rhizophora mangle* and peat marsh forest (*Juniperus bermudana* and *Sabal bermudana*). The area is of limited importance for waterfowl, however *Butoroides virescens* and *Gallinula chloropus* occur on passage and in winter. Ramsar site no. 990. Most recent RIS information: 1999.

Pembroke Marsh East. 11/05/99; Bermuda; 8 ha; 32°17'N 064°46'W. Nature Reserve. The site is an extensive freshwater Typha and Cladium marsh with some open water channels up to 3m deep. It supports juvenile populations of certain fish species (*Gambusia affinis*) and a wide variety of passage and wintering waterfowl (*Gallinula chloropus*, *Podilymbus podiceps*, *Botaurus lentiginosus*). The former landfill site is now being restored. Ramsar site no. 988. Most recent RIS information: 1999.

Somerset Long Bay Pond. 11/05/99; Bermuda; 1 ha; 32°17'N 064°51'W. A former tidal swamp that was filled in as a garbage dump and then restored into a brackish to freshwater pond with mangrove islets, separated from the sea by a beach dune. It is a low-lying sandy/peaty back beach area. The site supports Red and Black Mangrove and provides habitat for the Pied-billed Grebe (*Podilymbus podiceps*) and American Coot (*Fulica americana*). The site is used for tourism. Ramsar site no. 985. Most recent RIS information: 1999.

Spittal Pond. 11/05/99; Bermuda; 10 ha; 32°18'N 064°43'W. Nature Reserve. The only Bermuda example of a non-tidal permanent shallow brackish lagoon with fringing mudflats and salt marshes, subject to periodic sea flooding with mudflats exposed at low water levels. Bermuda's most important wetland for wintering waterfowl (*Egretta caerulea*, *Podilymbus podiceps*, *Anas rubripes*) and shorebirds (*Tringa Limnodromus*). Ramsar site no. 984. Most recent RIS information: 1999.

Warwick Pond. 11/05/99; Bermuda; 2 ha; 32°16'N 064°48'W. Bermuda's largest freshwater pond with mudflats at the north end and a broad fringing marsh. Good example of natural small island wetland. Important for the only freshwater adapted population of endemic Killifish (*Fundulus bermudae*). The most important mudflat for passage shorebirds (16 species including *Charadrius semipalmatus* and *Tringa melanoleuca*) on Bermuda. Ramsar site no. 986. Most recent RIS information: 1999.

A P P E N D I X V

**HSBC EQUATOR
PRINCIPLES**

The Ombudsman for Bermuda's
Systemic Investigation into the Process
and Scope of Analysis for
Special Development Orders

*(pursuant to s. 5(2)(b) and s. 24(2)(a) and (3)
of the Ombudsman Act 2004)*

HSBC Equator Principles

HSBC Holdings plc first adopted the Equator Principles on 4th September 2003. There are currently 73 adopting financial institutions (71 Equator Principles Financial Institutions and 2 Associates). The Principles apply to all new project financings globally with total project capital costs of US\$10 million or more and across all industry sectors.

Principle 1 – Review and Categorization

Category A – Projects with potential significant adverse social or environmental impacts that are diverse, irreversible or unprecedented.

Category B – Projects with potential limited adverse social or environmental impacts that are few in number, generally site-specific, largely reversible and readily addressed through mitigation measures.

Category C – Projects with minimal or no social or environmental impacts.

Principle 2 – Social and Environmental Assessment

HSBC ensures that the borrower has completed a Social and Environmental Assessment (“SEA”) process to address social and environmental risks and impacts of the proposed project. HSBC undertakes a review to confirm whether the project meets the Equator Principles and the SEA. Where the information in the SEA is not sufficient or the proposed mitigation and management measures are not satisfactory, HSBC has processes to request further information/action from the borrower. HSBC documents the outcomes.

Principle 3 – Applicable Social and Environmental Standards

The SEA should confirm that the project complies with relevant host country laws, regulations and permits for social and environmental matters. HSBC checks whether the project location is in a High Income OECD Country in order to determine which standards and Principles apply. Where the project is located in a High Income OECD Country, HSBC reviews the SEA to determine that the project complies with appropriate local and national laws.

Principle 4 – Action Plan and Management System

Where the project is located in a High Income OECD Country – HSBC may require development of an Action Plan based on relevant permitting and regulatory requirements and as defined by host country law.

Principle 5 – Consultation and Disclosure

HSBC ensures that the government, borrower or third party expert consults with project-affected communities in a structured and culturally appropriate manner. The SEA and AP, or non-technical summaries thereof, are made available to the public by the borrower for a reasonable minimum period in the relevant local language and in a culturally appropriate manner. Disclosure occurs early in the SEA process and in any event before the project construction commences, and on an ongoing basis.

Principle 6 – Grievance Mechanism

Consultation, disclosure and community engagement continues throughout the construction and operation of the project. The borrower received and facilitates resolution of concerns and grievances about the project’s social and environmental performance raised by individuals or groups from among project-affected communities.

Principle 7 – Independent Review

For each project assessed as being either Category A and, as appropriate, Category B, HSBC ensures that an independent social or environmental expert not directly associated with the borrower reviews the SEA and AP and consultation process documentation in order to assist HSBC’s due diligence, and assesses compliance with the Equator Principles.

Principle 8 – Covenants

For each project assessed as being with Category A or Category B, HSBC ensures that loan covenants are agreed with the borrower to address compliance with the Principles.

Principle 9 – Independent Monitoring and Reporting

HSBC requires the appointment of an independent environmental and/or social expert – or– requires that the borrower retain qualified and experienced external experts – to verify its monitoring information which would be shared with HSBC. HSBC has procedures in place to ensure that reports are received over the life of the loan.

Principle 10 – HSBC Reporting

HSBC commits to report publicly at least annually about its Equator Principles application processes and experiences, taking into account appropriate confidentiality considerations.

A P P E N D I X V I

**EXCERPT FROM 1994
COMPETITIVENESS COMMISSION
REPORT**

The Ombudsman for Bermuda's
Systemic Investigation into the Process
and Scope of Analysis for
Special Development Orders

*(pursuant to s. 5(2)(b) and s. 24(2)(a) and (3)
of the Ombudsman Act 2004)*

1994 Commission on Competitiveness: Strategic Assessment of Protectionism in Bermuda

The Commission on Competitiveness issued a final report in 1994 after two years of review of international trends, stakeholder consultations and sub-committee and commissioned reports (e.g. on Local Costs, Protectionism in Bermuda, Tourism Planning). A number of concerns expressed, as Bermuda was reacting to the 1989-1992 recession, are remarkably similar to concerns expressed now as we emerge from the recent recession.

In the past, Bermuda's tourism industry was in some respects a model: capable of capturing "upscale" tourists from the US and of leveraging the synergy with the international business sector. However, tourism has never been immune to global pressures. We rely on revenues from outside of Bermuda while costs are tied to internal inputs (construction, labour, supplies, professional services, etc.). It is well understood that such internal costs are a very expensive component of doing business in Bermuda, compared with many other jurisdictions. Therefore, tourism is often the first sector to feel the negative results as local prices rise. This is exacerbated when major trading partners are in a recession.

Our tourism industry saw a steady decline between 1987 and 1992. Industry losses totalled \$41.6 million and hotel employment fell 18%. Bermuda was able to minimize the impact of the recession of 1989-1992 by reducing a relatively larger percentage of non-Bermudian positions (58%) than Bermudian positions (42%). In absolute terms however, this meant that the departure of non-Bermudians led to a decline in retail sales, demand for rental property and services. The value of overseas purchases by Bermudian residents equalled 9% of the total retail sales. Then, as now, there was a sharp contraction of the local retail sector.

The decline could not be attributed solely to the global economy. Between 1980 and 1991, stay-over arrivals to the Caribbean grew almost 70% but declined in Bermuda by 22%. Bermuda's share of hotel rooms fell from 5.5% to 3.1% but Caribbean hotel rooms increased by 66%. The Caribbean leapt ahead despite Bermuda's apparent advantages and cachet. The Commission on Competitiveness noted: *"Bermuda is in sharp contrast to some Caribbean islands where tourist enclaves are protected by barbed wire, where desperate poverty greets the visitor, and where haphazard development and pollution intrude on the natural beauty."*

However, then as now, there was a view that Bermuda had not fully capitalized on its natural assets: *"Bermuda is selling a tourism product that is primarily its environment. It is a product that has not changed appreciably in many years...much of Bermuda's tourism product is not as fully developed or utilized as possible. The natural environment is outstanding...There are many opportunities to promote and develop more adventure and activities like diving, fishing, boating, sailing. There is a need for more golf and tennis facilities. Entertainment is lacking, cultural and historical experiences are limited. Natural experiences like bird-watching and hiking are not promoted."*

*"Unless we change the direction we are heading,
we might end up where we are going."*

(Chinese Proverb)

DUE PROCESS RESPONSES

(pursuant to s. 17 of the Ombudsman Act 2004)

DUE PROCESS RESPONSES

Due process review of the draft Report raised the following concerns (*My responses in italics*):

- The advice of the Department of Conservation Services on a case by case basis is provided within the context of the biodiversity strategy. *The TP SDO allows development on certain lots that technical officers recommended should not be developed.*
- There is a process in place to ensure that developers do not have to go to each relevant department. For hotel development, this is managed by the PS for Tourism. Similarly, the Department of Planning has implemented a pre-application consultation process to expedite issues to be addressed with the range of consultee departments. This process removes the need for developers to go “cap in hand” to the various consultees for feedback [and] streamlines the decision making of the Development Applications Board. *The process was less than optimal for the TP SDO.*
- All applicable law was followed...international standards, best practices and Charters do not equate to law. *The UK Environment Charter is the instrument by which the UK meets its international legal obligations with respect to the environment for the OTs. It is analogous to the Tax Information Exchange Agreements.*
- The challenge to your jurisdiction asserted that you could not investigate the actions of civil servants that are intended to advise the Minister and Cabinet. All other communications between civil servants, which certainly outnumber communications between civil servants and ministers, were made available for the Report. *Legal advice confirms: “steps taken (such as information gathering and analysis) by departmental officers and employees or others acting on behalf of the department with a view to advising a Minister of Cabinet are not excluded from the Ombudsman’s jurisdiction”.*
- Given the partiality and subjectivity that is involved in an own-motion investigation by an Ombudsman i.e. no test of a third-party complaint that has merit, it is left in doubt whether the outcome is without bias. *S.5(2)(b) of the Ombudsman Act (“Act”) provides for own motion investigations “notwithstanding that no complaint has been made”.*
- The better view may be to make recommendations without adverse “findings“. *S.15 of the Act requires me to report my decision regarding evidence of maladministration.*
- Own-motion investigations are rare and that one should go carefully. *Agreed. We take great care with every investigation – whatever the topic or size.*
- In the interests of transparency what were the “reasonable grounds“ upon which you determined that an own-motion investigation into the TP SDO was in the public interest? *See Introduction to Report.*
- The comment [re silos] is rather wide and ill-informed as to improvements through time in the direction of joined-up government in the Bermuda Civil Service. *See comments on silos in our Dec. 2010 Interim Report; I take the point that there are efforts to improve.*
- The SDO process in the end was resolved by the Legislature with an approval in principle. *Legislative approval deals only with who makes the decision.*
- The Cabinet decision-making process is subject to secrecy and therefore investigations into such decisions are barred by item 2 of the Schedule to the Ombudsman Act. It follows that the investigation could not ascertain all of the facts that were at Cabinet’s disposal. In such circumstances a finding of maladministration is not soundly based. Further it is harmful to the reputations of the Civil Servants involved in the SDO process. *This was not an investigation of Cabinet decision-making. My findings meet the civil standard of proof: contrary to Bermuda’s legal commitment, there was no EIA.*



Learn more about us at
www.ombudsman.bm