IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court at Lautoka

CIVIL APPEAL ABU NO. 004 OF 2023
[Lautoka Civil HBJ No. 006 of 2020]

BETWEEN **DAVID CONRAD PETERSON and RUTH ANNE As Trustees of the David Conrad Peterson and Ruth Anne Peterson Trust**

Appellants

AND **DIRECTOR OF THE DEPARTMENT OF TOWN AND COUNTRY PLANNING**

1st Respondent

CHRISTINE BADIA NKANKA aka CHRISTINE SILVIE BADIA

2nd Respondent

Coram **Prematilaka, RJA**
Morgan, JA
Clark, JA

Counsel **Mr Singh R. P & Ms Swamy A.B for the Appellant**
Mr Mainavolau J & Mr Chand J for the 1st Respondent
Ms Ali A for the 2nd Respondent

Date of Hearing : **03 February 2026**
06 February 2026

Date of Judgment : **27 February 2026**

JUDGMENT

Introduction

[1] The core issues for determination on this appeal concern the nature and extent of the powers of the Director of Town and Country Planning ("**the Director"**) under the Town Planning Act 1946. The essence of the appellants' grievance, as framed in their application for leave to apply for judicial review, is that when the Director approved a rezoning of land in Maui Bay thereby allowing the construction of a hotel on neighbouring property, he did so in breach of his statutory powers. The High Court determined that the Director's exercise of discretion under the Town Planning Act was lawful and refused to grant the relief sought.

Background

[2] The broad background to the litigation is set out in the judgment under appeal.[1] We gratefully borrow from His Honour's helpful description of the context in which the dispute between the parties arises.

[3] Maui Bay was originally one large piece of land comprised in Certificate of Title 2872. The owner subdivided and developed the land with the intention of creating an upmarket residential area although with a single site designated for hotel development.

[4] The concept was marketed to foreign investors. The appellants, David Peterson and Ruth Peterson ("**the Petersons**") were amongst those who purchased land in the area. In 2005 they purchased a foreshore plot and constructed as their residence, a substantial single-storey building.

[5] Following subdivision, all plots were zoned "residential" except for the single intended hotel site. Notwithstanding the residential zoning, some owners of the foreshore lots used their properties commercially. Some were providing accommodation. Others were operating restaurant and bar services. These operations were illegal because they contravened Maui Bay's permitted land use at the time.

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[1] *State v Director of the Department of Town and Country Planning; Ex parte Peterson* [2023] FJHC 2; HBJ06.2020 (18 January 2023) [**the High Court Decision]**.

[6] Ultimately, residents became irritated by the imposition of the commercial operations on their amenity. They complained to the authorities. With neighbours and government officials on the alert the "illegal operators" applied to the Director to have their lots rezoned from "Residential" to "Special Use (Tourism-Villa)" sites.

[7] On 23 December 2009, in response to the illegal commercial tourist operations in Maui Bay, and having consulted with residents, the Director implemented Specific Development Guidelines for Maui Bay. Maui Bay fell within the Nadroga Rural Town Planning Area, an area constituted by the Town Planning (Nadroga Rural) Order. Being within a town planning area Maui Bay's lands were "rural" land and not part of, or within, any "urban" planning scheme. Consequently there were no specific planning guidelines for the area beyond the General Provisions of the Town Planning Act and the discretionary powers that s 7 of the Act conferred on the Director. This legislative lacuna coupled with the demands from the tourist operators to rezone and extend the permissible land use prompted the Director to issue some clear planning guidelines for Maui Bay.

[8] On 29 December 2009, six days after the issue of the Specific Development Guidelines for Maui Bay, the Director approved a block rezoning of all the foreshore lots in Maui Bay from "Residential" to "Special Use (Tourism – Villa Site)". The Director's approval was granted on the following conditions which are recorded on the rezoned plan:

> Conditions of Approval
>
> 1. That Lots 1-6 DP 9240 & Lots 1-16,18 & 19 Muavunise, Baravi, Nadroga is (sic) rezoned from residential to Special Use (Tourism- Villa Sites).
> 2. That all development, activities & operations carried out on the site shall strictly comply with the Maui Bay Estate Specific Development Guidelines (2009)
> 3. That an Environmental Management Plan (EMP) and an Operational Environment Management Plan (OEMP) shall be submitted to the Director of Environment for determination. The building application relating to the development on the subject sites Lots 1-6 DP 9240 & Lots 1-16, 18 & 19 DP 9022 shall be submitted with the approved EMP & OEMP to the Director Town & Country Planning.
> 4. That neither building nor any structure shall be erected within the 8m creek bank reserve in compliance with the River and Streams Act.
> 5. That no building, development work and activity shall commence on the site unless consented to by the Director Town & Country Planning and approved by the Nadroga Rural Local Authority.
> 6. This approval is valid for two (2) years only.

[9] Being valid for only two years the block rezoning expired on 29 December 2011. His Honour noted the lack of clear evidence about any renewal. Counsel for the Director submitted that normally, on the expiry of an approval, a zone reverts to its original pre-approval character. The Judge accepted that as the logical likely outcome in this case.[2] In any event, over time, individual lot owners applied for and obtained the Director's approval to rezone their lots from Residential to Special Use (Tourism – Villa).

[10] We come now to the second respondent's purchase of the lot that is the subject of this judicial proceeding. Throughout the High Court judgment the second respondent is referred to as "**Nkanka**". For consistency and clarity we will do the same. We mean no disrespect to the second respondent in doing so.

[11] In 2019, Nkanka purchased the lot at the centre of the parties' dispute, a foreshore lot that shared a common boundary with the Petersons' Lot 17. The Judge termed Nkanka's lot, "Lot 16". We prefer not to do so although we understand the origins of His Honour's references to "Lot 16".

[12] In May 2019, when Nkanka purchased the lot in contention, she already owned Lot 15 which she had purchased in 2006 and upon which she had constructed four bures and a main bure with a swimming pool. In 2011 a hotel licence was issued in relation to the premises on Lot 15. The licence is exhibited to Nkanka's affidavit. Nkanka's further evidence (as at November 2020, the date of her affidavit) was that of the 19 original foreshore lots, 13 had been developed to operate businesses under hotel licences. There remained five vacant lots and the Peterson's lot was the only residential lot.

[13] Between the Petersons' Lot 17 and Nkanka's Lot 15 there was a vacant Lot 16. Lot 16 was later subdivided and renumbered. It was essentially halved and the two subdivided lots became Lot 1 and Lot 2. Nkanka purchased Lot 2 in 2019. The Petersons subsequently purchased Lot 1.

[14] The application for judicial review concerns the rezoning of the land comprised in Certificate of Title Number 40987, Lot 2 DP 10404. Accordingly, when discussing this Lot we refer to it as **Lot 2**.

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[2] High Court Decision, above n1 at [19].

[15] On 6 March 2020 Nkanka applied to the Director for approval to construct a three-storey tourist villa apartment on Lot 2. Approval was given on 28 April 2020 and construction began around 5 August 2020. From 10 November 2020 the building project would be past the mid point of construction. Wayne Downs, a Director of the construction company engaged to complete the development, filed an affidavit. Mr Downs deposed to being contacted by the Sigatoka Town Council in mid September 2020. On visiting the Council Mr Downs learned for the first time that the block rezoning lapsed two years after its approval in December 2009. It seemed that within Town and Country Planning there was no awareness of the apparent reversion of the zoning to "Residential". Mr Downs believed that was borne out by the fact Nkanka's application to construct a three-storey villa had been approved and a building permit issued.

[16] Nkanka made an application to rezone Lot 2 from Residential to Special Use (Tourism Villa). The Director's approval of the application to rezone was communicated in his letter dated 28 September 2020. This is the decision the appellants challenged in their judicial review proceeding.

What was Nkanka permitted to construct?

[17] The permit was for the construction of a tourist villa apartment. The appellants' case is that the Director's approval permitted the construction of a hotel and that the second respondent constructed a hotel. Both propositions are inconsistent with the evidence. Nkanka's application, and the Director's approval and detailed plan were in evidence in the High Court. Furthermore, in his affidavit filed 20 November 2020, Aisake Raratabu, Acting Principal Town Planner, corrected the assertions in Ruth Peterson's affidavit that approval had been sought and given for construction of a hotel. Mr Raratabu stated:

> The level 3 building approval for construction is actually a tourist villa apartment and not a hotel whereby other ancillary service are provided such as restaurant, bar, laundry, storage rooms and so forth.

[18] A little further on Mr Raratabu stated: "… the building for construction is for a tourist villa apartment and not a hotel". And at paragraph [52](v) of his affidavit Mr Raratabu

repeated: “The building development … on the subject Lot 2 … is not a hotel as alleged”.

[19] The High Court Judge did frame one of the issues as being whether allowing Nkanka to construct a three level hotel building was consistent with the Specific Development Guidelines for Maui Bay but His Honour made no finding that the development on Lot 2 was a hotel.

The Peterson’s Application for Judicial Review

[20] In October 2020 the Petersons applied for leave to bring judicial review proceedings. The grounds upon which they sought relief were that the Director:

[a] acted unreasonably and unfairly towards the Petersons in granting approval to rezone the land comprising Certificate of Title 40987, Lot 2 on DP 10404 “thereby allowing” Nkanka to construct a three level hotel on the site;

[b] breached the Petersons legitimate expectation of compliance with:

[i] the Specific Development Guidelines for Maui Bay;

[ii] Sch 7 and cl 4 of the General Provision made under s 7(4) of the Town Planning Act; and

[iii] conditional approval for rezoning made on 29 December 2009 ;

[c] acted irrationally and “ultra vires” his powers in approving the rezoning of Lot 2 “thereby allowing” Nkanka to construct a three level hotel building inconsistently and in breach of:

[i] the Specific Development Guidelines for Maui Bay;

[ii] Sch 7 and cl 4 of the General Provision made under s 7(4) of the Town Planning Act; and

[iii] conditional approval for rezoning made on 29 December 2009; and

[d] failed to take into account relevant considerations and took irrelevant matters into account.

[21] By way of relief the Petersons sought :

[a] an order of certiorari quashing the decision the Director made on 28 September 2020 approving the rezoning of Lot 2 "thereby allowing" Nkanka to construct a three level hotel building;

[b] an order of mandamus constraining the construction of the hotel building;

[c] a declaration that the 28 September 2020 decision approving the rezoning of Lot 2 was inconsistent with the Specific Development Guidelines for Maui Bay and Sch 7 and cl 4 of the General Provision made under s 7(4) of the Town Planning Act;

[d] damages; and

[e] costs on an indemnity basis.

[22] On 9 December 2020 the High Court granted leave to the Petersons to apply for judicial review. The application for judicial review was heard in March 2022.

The High Court Decision

[23] The High Court Judge refused to grant relief.[3] We consider the High Court decision in greater detail when examining the grounds of appeal. For the moment it is sufficient to note His Honour's five key findings and the broad bases for them:

[a] During a site visit on 25 February 2022 His Honour observed that the construction of Nkanka's three-storey building was in the finishing stages. Consequently the prayer for an order of mandamus requiring the Director to restrain construction was "redundant".[4]

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3 High Court Decision above, n1, at [105].
4 At [28].

[b] Maui Bay was not, and could not be, a "scheme" under the Town Planning Act. An instrument purporting to be a scheme could only be a valid scheme if constituted in accordance with the procedures set out in the Act.[5]

[c] The Director did not act beyond his statutory powers when granting a rezoning approval to Nkanka. While, as a matter of law, the General Provisions did not apply to a development in an area such as Maui Bay the Director could have regard to them if he considered they were material.[6]

[d] The Director was not bound by the Specific Development Guidelines for Maui Bay but he could take them into account as a material consideration when considering building approvals in the exercise of his discretion under s 7(4) of the Town Planning Act.[7]

[e] The Specific Development Guidelines for Maui Bay did not give rise to a legitimate expectation the Director would strictly adhere to them. But that Maui Bay residents could legitimately expect they would be consulted before approval of a development that entailed a departure from the Guidelines.[8]

Grounds of Appeal

[24] In their notice and grounds of appeal filed on 10 February 2023 the appellants particularise no fewer than 18 grounds of appeal. For the purpose of the appeal hearing Mr Singh, counsel for the appellants, addressed the 18 grounds under five heads of argument. In this judgment we proceed likewise.

Ground 1

[25] The appellants contend that the Judge erred by "utilising evidence adduced by the second respondent in their written submissions, which was unfair to the appellants".

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5 At [32] and [42].
6 At [64].
7 At [81]-[85].
8 At [95]-[96].

[26] The complaint is that following oral argument in the High Court Ms Ali, counsel for the second respondent, filed written submissions but with documents attached. The appellants objected to seven of the annexures on the basis that they were not exhibited to affidavits and therefore not properly tendered as evidence. In their written submissions in reply to the second respondent's written submissions, the appellants objected to the annexures attached to Ms Ali's written submissions. Relying on *Re Nakasi Tyre Centre Ptd Ltd*, the appellants contended that provision of the annexures was tantamount to counsel giving evidence from the bar.[9]

[27] Regrettably, it appears that His Honour did not address the appellant's objection to the annexures.

[28] We have examined the annexures about which the appellants complain.[10] Most are business or publicly available documents, for example: a two-page reproduction of information from the Ministry for Local Government website explaining the subdivision process and application requirements; a Scheme Plan for Sigatoka obtained from the Sigatoka Council on 15 March 2022; the Ministerial Order dated 16 September 1960 showing what used to be Nadroga Rural Authority now Sigatoka Town Council; and a copy of Sch A and Sch C of the General Provisions 1999.

[29] While it was no doubt preferable for the documents just described to have been made available during the course of the hearing, from the transcripts and the Judge's Notes, it seems likely that their relevance and utility became more apparent as the arguments developed in the High Court.

[30] We note s 11 of the Civil Evidence Act 2002 permits a document forming part of the records of a business or public authority to be received in evidence in civil proceedings without further proof. While the statutory steps for proving that the documents were in fact business records were not taken, s 11(6) would have permitted the court to direct that the steps did not apply in relation to the documents. As we have observed, the Judge did not specifically rule on the appellant's objection but nor do we consider that the appellants were prejudiced by the provision of these materials to the Court. While

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9 *Re Nakasi Tyre Centre Ptd Ltd* [2021] FJHC 370; HBE25.2021 (9 December 2021).

10 Attached as A, B, D, E, H, I and J to the second respondent's written submissions in the High Court.

they assert unfairness the objection is purely technical in the sense that no complaint is made about the authenticity of the documents, their relevance or materiality to the issues.

[31] There were three further annexures to which the appellants objected:

[a] an email exchange between the parties on 18 February 2022 concerning the hearing date;

[b] a one-page letter to Nkanka from the Department of Environment dated 24 July 2020 acknowledging receipt of her Environment Impact Assessment application and providing its one-paragraph determination;

[c] an email exchange on 29 April 2021 concerning Lot 1.

[32] There is no question that it was wrong to provide these communications to the Court as attachments to submissions. The documents were not merely attached but were referenced and explained in the second respondent's written submissions. It is apparent from those submissions that counsel's interest in attaching the documents was to support the submissions she made on particular topics.

[33] Understandably and quite properly, the appellant has objected to the manner by which the documents were provided to the Court. Our consideration of the appellants' objection is influenced by the fact that, while of particular relevance to the second respondent, the matters addressed in the documents had no relevance to the issues for determination by the High Court Judge. There is no reference to the topics in the High Court decision itself nor any indication the Judge turned his mind to them.

[34] Again, we note that while properly made, the objection is not to authenticity or relevance or the determinative potential of the documents but to the manner of their introduction. Nor did the appellants make any claim of prejudice or other substantive objection when they protested the admission of the material in their written submissions to the High Court. And they have not suggested on appeal that the documents were even considered by the High Court Judge much less influential on the outcome.

[35] Accordingly, the appellants have not shown that the High Court utilised evidence adduced by the second respondent and which was unfair to the appellants. This ground of appeal does not succeed.

Grounds two and three

[36] In their second and third grounds of appeal the appellants argue the Judge erred in holding that Maui Bay Development is not a scheme under the Town Planning Act and that Maui Bay Subdivisional scheme is not a scheme under the Town Planning Act, the Subdivision of Lands Act and the General Provisions.

[37] The appellants' position in the High Court was that Maui Bay and the Specific Development Guidelines for Maui Bay issued by the Director constituted a "scheme" under the Town Planning Act. The Judge addressed the question as an important preliminary point early in his judgment. His Honour noted the definition of "scheme" in s 2 of the Town Planning Act and the statutory process by which a scheme is prepared, notified and finally approved under the Act. He determined that the Specific Development Guidelines for Maui Bay did not fall within the statutory definition of "scheme" and was not a scheme under the Act.[11]

[38] The distinction between a "town planning scheme" and a "town planning area" is important because each engages the Director's powers differently. An essential plank in the appellant's case is that the Maui Bay Development was located within a Town Planning Area. Therefore, Mr Singh submitted, when approving Nkanka's application to develop Lot 2, **the** Director was required to consider the General Provisions and Site Specific Development Guidelines.

[39] The constitution of a scheme under the Town Planning Act is tightly prescribed. Part 2 of the Act deals with Town Planning Schemes, their objects, content, preparation, provisional approval, the procedure for hearing and determining objections, final approval and the operation and modification of approved schemes. Mr Singh accepted in the High Court that none of these procedures were engaged when the Director issued the Specific Development Guidelines for Maui Bay.[12]

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[11] High Court Decision, above, n 1 at [31]-[42].
[12] At [42].

[40] Additionally, residents within a town planning scheme must pay rates to the relevant council to support municipal services. Residents of the Maui Bay Estate are not so obliged as the Estate does not fall within the ambit of the Sigatoka Town Council's rateable boundary. As the High Court Judge recorded, Maui Bay is within Baravi but falls just outside the boundaries of Sigatoka town.

[41] Maui Bay falls within the Nadroga Rural Town Planning Area which area was constituted by the following order:

> **TOWN PLANNING (NADROGA RURAL) ORDER**
>
> Orders 16th September, 1960; 14th July 1965.
>
> 1. This Order may be cited as the Town Planning (Nadroga Rural) Order.
>
> 2. The area set out in the Schedule is hereby constituted a town planning area to be known as the Nadroga Rural Town Planning Area.

[42] The Order, with its accompanying schedule describing the area to which the Order refers, is one of the many Orders in the Schedule to the Town Planning Act. As His Honour observed:

> [6] … All the lands constituted in the said town planning area are "rural" lands. They are not part of any "urban" planning scheme.

[43] Not being a scheme within the meaning of Part 2 of the Act, Maui Bay developments were subject to the Director's overarching powers of consent and approval under s 7 of the Act.

[44] The appellants' contention that Maui Bay is to be regarded as a scheme flies in the face of the Town Planning (Nadroga Rural) Order which put Maui Bay's town planning status beyond argument. The appellants have not shown that the Judge erred in determining Maui Bay was within the Nadroga Rural Town Planning Area.

Grounds 4, 5 and 6 and grounds 8, 10, 11, 16, 17 and 18.

[45] In his submissions on appeal Mr Singh addressed grounds 4, 5 and 6 together. As particularised in the appellants' Notice and Grounds of Appeal, grounds 4, 5 and 6 assert error and misunderstanding on the part of the High Court Judge in his approach to

"schemes" under the Town Planning Act, their nature and purpose, how they are made and their relationship to General Provisions under the Town Planning Act. In advancing these grounds of appeal Mr Singh relied on wording in the General Provisions to support the appellants' position under these heads of appeal.

[46] Grounds 8, 10, 11, 16, 17 and 18 as particularised in the Notice and Grounds of Appeal concern the General Provisions and the extent to which there was non-compliance with them in rezoning Lot 2. Mr Singh's submissions took these six grounds together.

[47] This part of the appellants' case on appeal asserts an inter-relationship between the creation of a scheme and the General Provisions so as to demonstrate error in the Judge's conclusion that the Maui Bay Development was not a scheme within s 2 of the Town Planning Act. We therefore turn to examine the nature of the General Provisions, their status and the part they played in the Director's decision-making in this case.

The General Provisions

[48] The General Provisions were approved by the Director of Town and Country Planning in 1999. It is a 49-page "document" consisting of nine "Provisions" and nine Schedules which contain requirements and dispensations that are to apply to any development within a Planning Scheme area.

[49] The Preface states:

> **GENERAL PROVISIONS FOR TOWN PLANNING SCHEMES AND AREAS**
>
> The General Provisions attached hereto have been approved by the director of Town and Country Planning and are to be used for the purposes of Section 7(4) of the Town Planning Act as containing provisions proposed to be included in Town Planning Schemes.
>
> These General Provisions are to be applied as Interim Development Control or as guidelines in the following classes of Areas and cases.

[50] The three classes to which the General Provisions are to be applied are then set out:

CLASS 1 Approved Town Planning Schemes

CLASS 2 All other Town Planning Areas including General Town Planning Areas that is Areas in which the town planning schemes are not yet "Approved Town Planning Schemes" but are provisional or draft or are at other stages of development.

CLASS 3 Subdivision of Land Act Areas - any land (not being in a Town Planning Area but concerned in an application made to the Director) to which the Director considers the General Provisions would be appropriate guidelines for the examination of such applications.

[51] The Preface concludes with the following statement:

> **General Provisions to Prevail Over By-Laws**:
>
> In accordance with section 17, subsection (4) of the Town Planning Act (Cap39), the provisions of these General Provisions shall have effect notwithstanding any By-Laws for the time being in force in a City or Town and where the General Provisions are inconsistent with the provisions for any By-laws, these General Provisions shall prevail.
>
> The Director hopes that these General Provisions will be incorporated in all Approved Town Planning Schemes at the next revisions of each scheme.

[52] As counsel for the Director, Mr Mainavolau, summarised their effect, the General Provisions are intended primarily for town and urban areas but may be applied to areas outside town schemes at the discretion of the Director. They prevail over bylaws but those bylaws relate only to town schemes. Maui Bay lies outside any town scheme.

[53] Mr Singh submitted that generally, grounds 4, 5 and 6 were concerned with whether the Maui Bay Development could be categorised as a scheme. The appellants' underlying concern is with the High Court's finding that if the Development was not a scheme then the General Provisions would not apply.

[54] We are in no doubt that Maui Bay is not a scheme within the meaning of the Town Planning Act and the High Court Judge was correct in his determination of the point. The appellants submit the finding was in error because it ignored the fact the Town Planning Act covers both schemes and town planning areas "ensuring progressive inclusion of areas into schemes over time". But the fact the Act provides for both

schemes and town planning areas does not of itself show that Maui Bay is a scheme within the meaning of s 2 of the Act.

[55] The appellants identify provisions within the General Provisions as supporting their position. It is not necessary to address each of the examples. The intended scope of the General Provisions is clear. The General Provisions contain mandatory guidance for developments within urban or town areas forming an integral part of the town planning scheme and are binding on developments within such areas.

[56] Not being a scheme within the meaning of Part 2 of the Town and Planning Act Maui Bay does not fall within the ambit of the General Provisions.

[57] We turn to the Specific Development Guidelines for Maui Bay which, as with the General Provisions, the appellants say are to be strictly applied.

Specific Development Guidelines for Maui Bay

[58] The appellants argue the Guidelines were to be strictly applied to control developments yet they were not because Nkanka was permitted to construct a three-storey hotel in breach of both the Guidelines and the approval for construction of the Tourist Villa.

[59] We have addressed the nature of Nkanka's construction and whether or not it was a hotel. The evidence before the Court shows it is not.[13]

[60] We make a further necessary observation before proceeding. This aspect of the appellants' case is founded on the assertion that Nkanka constructed a hotel and the hotel is in breach of the Specific Development Guidelines for Maui Bay. We have addressed the nature of the construction. At the risk of being repetitive, it is not a hotel. But the further point concerns the appellants' conflation of the 28 September 2020 rezoning decision with the construction. It is apparent that the appellants are aggrieved by the construction on the neighbouring land but their application for judicial review avoids a direct challenge to the building approval and permit. Instead the Petersons challenge the Director's rezoning decision while linking it inextricably to the

[13] See above at [17]—[19].

construction. The conflation of the rezoning decision with the construction itself begins in the application for leave to apply for judicial review. Relief is sought on several grounds but they all follow a format by which the appellants achieve conflation of the rezoning decision with the construction itself, for example: the Director acted unreasonably/or unfairly/ or ultra vires his powers/ or irrationally in approving the rezoning "***thereby allowing*** the second respondent to construct a three level hotel building …". (The emphasis is ours.)

[61] The case has proceeded on the basis the Petersons challenge the construction. While they do protest the construction they did not directly challenge it. That would have required a properly pleaded challenge to the issue of the building permit whereas the pleaded challenge is to the decision to rezone.

[62] Against the backdrop of those observations we turn to the appellants' central submissions about the Specific Development Guidelines for Maui Bay — that they were to be strictly applied but were not. For example, the appellants submit the Guidelines expressly prohibit the construction of hotels on the site.

[63] We have discussed the reasons the Director developed and issued the Guidelines but not their content or status. The Introduction to the Guidelines refers to Maui Bay Estate being subdivided "as a large up market residential area" and that the location of the area within the Coral Coast Tourism Zone creates a need for a "specific flexible planning environment" with "parameters, performance criteria and guidelines". The Guidelines reflect the need to "keep the estate as a predominantly low key up market residential area with the provisions of Special Use (Villa) developments that blend in well and compatibly with the residential development".

[64] The 7-page Guidelines document then mentions " opportunities" and "constraints" and sets out development principles and types. Relevantly, the Guidelines prohibit budget, dormitory and backpacker type accommodation. Nor are hotels, night clubs, service stations and other specified businesses permitted. Critically, however, the Guidelines explicitly permit "relaxation" of its provisions and requirements subject to the Director's prior approval and they preserve a discretion to the Director to consider "any development not listed or described" in the Guidelines.

[65] We accept Mr Mainavolau's submission that the Specific Development Guidelines for Maui Bay were issued to assist development control and are not statutory instruments. The overarching discretion reserved to the Director to both relax Guideline requirements and consider developments beyond those provided in the Guidelines answers the appellants argument that they are to be strictly applied.

[66] The High Court Judge concluded the Guidelines were but a factor to be taken into account: [14]

> To elevate [the Guidelines] to a level requiring strict compliance, would amount to a fettering of the discretion in s 7(4). As Ms Ali alludes, that would render the discretion unadaptable to the changing times, and to changing preferences in land use, and make the [Guidelines] akin to a set of restrictive covenants which they are not.

[67] We agree with His Honour.

[68] The next question is whether the Director's decision to rezone Lot 2 should be set aside on any other pleaded basis. In other words, was the exercise of the Director's discretion under s 7(4) ultra vires, irrational or reached in breach of the appellants' legitimate expectation. This part of our judgment will also engage grounds **12, 13 and 14** of the appellants' notice of appeal.

Was the Director's rezoning approval of 28 September 2020 unlawful or reached on an improper basis?

[69] Before considering the parties' positions on this point it is necessary to resolve a point raised by counsel for the Director who opposed the application for judicial review on what was essentially a jurisdictional ground. Mr Mainavolau submitted that the appellants initiated judicial review proceedings without first exhausting the statutory remedies available to them under s 5(2) of the Town Planning Act. Section 5 provides:

> **[TP 5] Appeals**
>
> (1) There shall be a right of appeal, subject to the provisions of this section, from decisions of the Director to the Minister within 28 days of notification of the decision to the appellant, and the decision of the Minister on the matter at issue

[14] At [83].

shall be final, provided that the Minister may for good cause extend the said period of 28 days.

(2) The right of appeal shall be exercisable by—

(a) any applicant and any local authority dissatisfied with the grant or refusal of development permission or the conditions attached to such permission or the prohibition of the grant of such permission under the provisions of section 7(3);

(b) any person having an interest in the land and any local authority dissatisfied with the revocation or modification of or refusal to revoke or modify development permission under the provisions of section 9(1);

(c) any person having an interest in the land and any local authority dissatisfied with the confirmation of or refusal to confirm an order requiring discontinuance of use or an order imposing conditions on the continuance thereof or an order requiring steps to be taken for the alteration or removal of buildings or works under the provisions of section 10(1);

(d) any objector and any local authority dissatisfied with a decision of the Director under the provisions of s 23;

(e) any objector and any local authority dissatisfied with a decision of the Director under the provisions of section 27(4).

[70] Mr Mainavolau submitted the word "applicant" in s 5(2)(a) is not confined to a person applying for development permission but could be construed broadly to include any person directly affected by a development decision, such as the appellants in this case who object to the Director's decisions. Mr Mainavolau's overarching submission was that the Town Planning Act provides a comprehensive appellate process for both applicants and objectors dissatisfied with a decision of the Director.

[71] When asked if he viewed s 5 as an effective ouster clause, Mr Mainavolau insisted that s 5 prevented judicial review. Counsel was unable to provide any authority for his position.

[72] In *Tannadyce Investments v Commissioner of Inland Revenue* McGrath J discussed the courts' concerns about legislation which may limit access to the courts.[15] His Honour observed that a central role of the courts of higher jurisdiction is to ensure that when

[15] *Tannadyce Investments v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.

public officials exercise the powers conferred on them, they act within them. Judicial review is the common means by which the courts hold officials to account. When interpreting appeal provisions in legislation the courts do not presume that it was Parliament's intent to allow decision-makers the power to conclusively determine a question of law. Even legislation which purports to restrict, rather than prohibit, judicial review may interfere with the responsibility which the courts have for supervising the lawfulness of the activities of government.[16]

[73] Sometimes a statutory appellate process can provide a remedy for breach of natural justice that is superior to the courts because an initial unfairness may be more quickly redressed and the appellate process may also enable the impugned decision to be replaced by a fresh decision on the merits. The courts do not have that jurisdiction in judicial review proceedings.

[74] Section 5 provides a bare right of appeal to those who are "dissatisfied" with any of the decisions set out in s 5(a)—(e). Section 5 provides no framework beyond a fresh appellate determination by the Minister whose decision is to be final. The Minister is not required to act "judicially" or in any particular way and there is no process for the "hearing" of the appeal. More fundamentally, issues of "lawfulness" in the exercise of statutory power (if they arise) will properly remain matters for determination by the courts rather than by the executive arm of government. We do not construe s 5 in the Town Planning Act as reflecting a Parliamentary intention to limit access to the supervisory jurisdiction of the court.

[75] It follows, that we do not accept that the failure of the appellants to pursue the statutory appeal process renders the application for judicial review "premature and incompetent", as counsel submitted.

[76] We now return to the issue of the lawfulness of the Director's rezoning decision and the nature of the Director's discretion under s 7(4).

[16] At [3]-[4].

Material considerations

[77] The appellants submit that when exercising his discretion under s 7(4) of the Town Planning Act, the Director is required to take into account all relevant matters but he failed to consider "all material matters and totally disregarded the General Provisions, the Specific Development Guidelines for Maui Bay, and his approval for rezoning".

[78] Section 7 deals with applications to develop land. Section 7 provides:

> **Restriction on carrying out of development after constitution of town planning areas**
>
> 7 (1) Subject to the provisions of this section, the permission of the local authority shall be required in respect of any development of land carried out within a town planning area during the period before a scheme affecting such area has been finally approved.
>
> (2) The use for the display of advertisements of any external part of a building which has not normally been used for that purpose shall be treated for the purposes of this section as involving a material change in the use of that part of the building.
>
> (3) The local authority shall not grant or refuse permission under this section without the prior consent of the Director and the Director may approve such grant or refusal either unconditionally or subject to conditions and may prohibit such grant or refusal.
>
> (4) In dealing with applications for permission to develop land under this section, the local authority and the Director shall have regard to the matters set out in the Schedule, to provisions proposed to be included in a scheme and to any other **material considerations**. [Emphasis added.]
>
> **…**

[79] Both the local authority and the Director are engaged in the process of considering applications to develop land but it is the Director who must approve any refusal or grant of an application: subs (3).

[80] In dealing with applications to develop land both the local authority and the Director "shall have regard to matters set out in the Schedule, to provisions proposed to be included in a scheme and to any other material considerations": subs (4).

[81] The High Court Judge noted that the Act contained no definition of "material considerations". His Honour considered the effect of a lack of a definition meant a rather wide discretion was conferred on the Director when considering an application for development.[17] We do not agree with the appellant's characterisation of the High Court judgment as conferring an "unfettered discretion".

[82] The question of what constitutes a "material consideration" in a statutory planning context has been considered by the UK Supreme Court. In *The Health and Safety Executive v Wolverhampton City Council* the appeal before the UK Supreme Court raised a short issue of construction under the UK Town and Country Planning Act 1990 (the UK Act). Differing views had been expressed by experienced planning judges in the courts below.[18] The relevant subsection gave power to a planning authority to revoke or modify any permission to develop land granted on an application under the relevant part of the Act. Section 97(2) of the UK Act provided:

> In exercising their functions under subsection (1) the authority shall have regard to the development plan and to any other material considerations.

[83] Lord Carnwath delivered the judgment. His Lordship made the point that in planning law the expression "material considerations" had acquired "an impressive overburden of case law" but he considered the expression could be treated as elsewhere in administrative law:[19]

> … that is, as meaning considerations material (or relevant) to the exercise of the particular power, in its statutory context and for the purpose for which it was granted".

[84] The High Court Judge regarded s 7(4) as giving the Director a "wide discretion" underscoring the "great complexity and breadth involved in planning decisions".[20]

> A proposed development in Maui Bay may be contrary to some expectations to preserve the residential character of the neighborhood – and yet be

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[17] High Court Decision at [79].
[18] *The Health and Safety Executive v Wolverhampton City Council* [2012] PTSR 1362, [2012] 1 WLR *2264*, [2012] 4 ALL ER 429, UKSC [2012] 34.
[19] *The Health and Safety Executive v Wolverhampton City Council* at [49].
[20] High Court Decision above n1 at [92]

> conducive to the promotion of tourism-activities in the wider Coral Coast area of which Baravi/Maui Bay is a part.

[85] While they did not bind him it was open to the Director to consider the Specific Development Guidelines for Maui Bay and the General Provisions and he did so. They were within a range of material considerations which the Director is required to assess along with other planning, environmental and safety considerations. In the present case, other material factors which the Director considered included the physical vulnerability of the swimming pool to coastal wave action and the adaptability of the three-story villa to its location. The decision to permit the construction of a sea wall was a reasonable exercise of the Director's obligation to assess structural safety and environmental protection of the development.

[86] It appears to us that the appellants' case under this head of appeal is not so much that the Director failed to consider the Specific Development Guidelines for Maui Bay and General Provisions, but that he was bound by them. We have discussed that argument and found it to be without merit.

Legitimate expectation

[87] The appellants' essential point is that the High Court Judge erred in finding they had only a legitimate expectation as to procedure and not substantive outcome. Mr Singh submitted the appellants' expectation was substantive. It arose from the Specific Development Guidelines for Maui Bay and also the Town Planning Act and General Provisions because when the Director made his rezoning decision it was a condition of the rezoning that developments would comply with the Specific Development Guidelines for Maui Bay. Mr Singh submitted that the Director "had promised" to act in a particular manner in the sense that when he approved the rezoning, it was on condition that the development would be carried out in accordance with the Guidelines.

[88] The submission is similar to the argument that we have already found to be unmeritorious: that the Director was bound to strictly comply with the Specific Development Guidelines for Maui Bay. We consider he was not and that the High Court Judge correctly decided the point.

[89] In *Pacific Transport Company Ltd v Khan* the Court of Appeal amplified the concept of legitimate expectation.[21] Drawing on early English and Australian authorities the Court of Appeal described the expectation as relating to a privilege, advantage or benefit to which there is no legal right. Customarily it arises where -

[a] an express representation has been made to a person or a group that a certain procedure will be followed before a decision is made; or

[b] there is a longstanding practice of following a certain procedure before a decisions is made.

[90] As did Mason CJ in *Attorney-General of New South Wales v Quin* the Court of Appeal in *Pacific Transport Company Ltd v Khan* stressed the need for the court to "avoid confusion between the content of the expectation and the right to procedural fairness."[22]

[91] The submission that the Director "promised" to act in a particular manner, and that the appellants derived a legitimate expectation from the promise, misconceives the function of the conditions which will from time to time accompany the Director's approvals. In stipulating conditions, the Director made no express representation to the appellants. And the appellants can have no legitimate expectation in relation to the Director's approach to the conditions he imposes on someone else, let alone that he must fetter his discretion by being able only to demand strict compliance.

[92] Before leaving this ground we make a final comment. In his final conclusions His Honour urged the Director to consider the observations at [95]-[96] of his Judgment. There, His Honour suggested that it might legitimately be expected that if the Director intended to depart from the Specific Development Guidelines for Maui Bay when considering a development application, he would consult residents. We have misgivings about that proposition. First, it does not take into account that the Guidelines specifically state that any "development not listed or prescribed above may be considered at the discretion of the Director …". The Guidelines also acknowledge the possibility of relaxations to those provisions because they state that any relaxation

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21 *Pacific Transport Company Ltd v Khan* [1997] FJCA 3; ABU0021.1996 (12 February 1997)

22 *Attorney General of New South Wales v Quin* (1990) 170 CLR 1.

"shall require the prior approval of the Director…"., Secondly, it seems to us that to require the Director to consult residents on every occasion when the Director proposes to exercise his discretion to depart from Guidelines would be tantamount to a fettering of his discretion and, conceivably, administratively unworkable.

[93] The appellants' have not shown the High Court Judge erred in finding no breach of a legitimate expectation.

Final matters

Application to adduce fresh evidence

[94] By summons dated 28 December 2023, the appellants seek leave to adduce fresh evidence. Specifically, they wish to adduce:

> the approved scheme plan for subdivision of the land comprised in balance of Certificate of Title 2872, Muavunise, Baravi commonly known at Maui Bay Development issued by the 1st Respondent and the lands contained therein subdivided.

[95] Conrad Peterson filed an affidavit in support of the summons. Mr Peterson's essential reasons for seeking to adduce the document are that:

[a] The respondents did not disclose the document; therefore the High Court did not have the benefit of being able to consider it when considering the appellants judicial review challenge;

[b] The document establishes the appellants' land and second respondent's land was zoned for residential purposes only under a scheme created by the Director and the Specific Development Guidelines for Maui Bay were created in terms of the scheme; and

[c] The document would have had a significant effect on the outcome in the High Court.

[96] Mr Singh submitted that the document is imperative and relevant to the appeal; that it was in the custody of the first respondent and ought to have been disclosed and that "the Subdivisional Scheme establishes that the land was … a formally approved subdivisional scheme implemented in accordance with Part 2 of the Town Planning Act".

[97] Ms Ali submitted that it was difficult to discern the exact nature of the appellants' case because they initially argued Maui Bay Estates was within a Town Planning Scheme and adherence to the General Provisions and Specific Development Guidelines for Maui Bay was mandatory. But Schemes under Part 2 of the Act require to be gazetted. That did not happen so, Ms Ali contended, the appellants pivot to claiming the Subdivisional Scheme Plan created by the Estate's developer constitutes a draft "scheme plan" thereby invoking mandatory application of the General Provisions. They seem to argue that the plan establishes permanent "residential" zoning for the properties and seem to argue the properties in the Maui Bay Estate cannot be rezoned from residential to any other category without public consultation and strict compliance with the General Provisions and the Guidelines.

[98] In considering the parties' positions, their submissions and their evidence we note but put to one side the first respondent's challenge to the appellants' contention that they discovered the document following the outcome of their case in 2023. In his affidavit in opposition Mr Raratabu, Principal Town Planner, notes the document shows a fax entry of 10.11am on July 9 2003. We cannot determine by whom or to whom the document was faxed on that date.

[99] That said, the appellants have not explained how they "discovered" the document which they seek to adduce. This Court may accept fresh evidence if it thinks it necessary or expedient in the interests of justice.[23] An applicant for leave to adduce fresh evidence on appeal must satisfy the appellate court that the evidence is "fresh" that is, it could not with reasonable diligence have been obtained for use at the trial; that it would probably have an important influence on the result and that it is apparently credible.[24]

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[23] Court of Appeal Act 1949, s 28.

[24] *Western Marine Ltd Levakarua* [2013] FJCA 52; ABU90.2010 (30 May 2013); Ladd v Marshall [1954] EWCA Civ1; [1954] 3 All ER 745.

[100] The document is a developer's plan. Although it remains the property of the developer a copy is kept in the first respondent's records. The appellants did not seek discovery and the Director had no obligation to disclose a document which may only be provided to a third party upon the direction and with the consent of the developer.

[101] More fundamentally, we do not agree that the document would have had the effect on the High Court's reasoning and outcome that the appellants suggest. As discussed earlier in this judgment, the Maui Bay development was initially zoned "residential" but rezoned to Special Use (Tourism Villa). In part the rezoning was to regularise the illegal tourist activities and it took place following a comprehensive public participation exercise conducted by the first respondent with affected land owners, representatives of the tourism industry and government ministries. All of the beachfront lots were rezoned. The only exception was Lot 17, belonging to the appellants.

[102] The developer's plan did not, as the appellants seem to suggest, establish a permanent residential zoning for the rezoned properties. A developer's plan is just that: a plan by the developer which the Director reviews and about which he makes directions. A plan is subject to periodic modification by the Director and, as Mr Raratabu observed, the plan which the appellants seek to adduce, could have been modified.

[103] The appellants' application to adduce fresh evidence is refused.

Argument that Sigatoka Town Council was the proper party

[104] Throughout the hearing of the appeal Ms Ali made strong representations about the non-joinder of the Sigatoka Town Council. Counsel submitted judicial review lies against public authorities not private individuals and the appellants wrongly named Nkanka as a second respondent forcing her to incur unnecessary costs. Ms Ali submitted the appeal should be dismissed or struck out on the basis of this fatal procedural defect (as well as lacking merit).

[105] We can deal briefly with the submission. Order 53, R3 (3) of the High court Rules requires copies of all applications for leave to apply for judicial review "to be served on all persons directly affected by the application". There can be no doubt the second

respondent was properly served. How a party "directly affected" by an application for judicial review then engages in the proceeding is entirely up to that party. They can even decide to abide the court's decision and not participate. And they can apply to join additional parties. It is evident to us in this case that the second respondent desired to take, and did take, not just an active role but a primary role. In both hearings, having agreed the order of appearance with counsel for the Director, Ms Ali sought to present her submissions before the Director. It so happens that in the Court of Appeal we did not give permission to proceed in that way because we wished to hear first from the Director as to the statutory context and then from the second respondent.

[106] While Councils have functions under s 7, the primary responsibility for determinations under s 7 lies with the Director. He was the proper respondent in this proceeding and it was the Director's decision to rezone that was the subject of challenge. There was no abuse of process nor other procedural infelicity in the appellants not joining the Sigatoka Town Council.

Conclusion

[107] Although the application for judicial review did not expressly challenge the Director's issue of a building permit to Nkanka to enable her construction of the villa, on the basis of the extensive evidence and submissions nevertheless addressing the point, we are satisfied the permit was properly issued and the construction complied with the Director's conditions.

[108] For the reasons we have discussed we are satisfied the Director's decision on 28 September 2020 to rezone Lot 2 was lawful and that all of the grounds of appeal are without merit. Accordingly the appeal is dismissed.

[109] The awards of costs that we make reflect the outcome of the appeal as well as the appellants unsuccessful application to adduce fresh evidence.

Orders of the Court:

1. *The appeal is dismissed.*
2. *The application to adduce fresh evidence is dismissed.*
3. *The appellants are ordered to pay costs to the first respondent in the sum of $7,000 with 21 days from the date of this judgment.*
4. *The appellants are ordered to pay costs to the second respondent in the sum of $10,000 within 21 days from the date of this judgment.*
5. *The Registry is directed to release to the appellants, the second respondent's payment into court of costs in the sum of $4,500.*

Hon. Mr. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL

Hon. Mr. Justice Walton Morgan
JUSTICE OF APPEAL

Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL