



OMBUDSMAN FOR BERMUDA'S

Special Report to Parliament
Diligent Development - Getting It Right

Update on Legal Status of
UK ENVIRONMENT CHARTER

May 2013



May 10, 2013

The Speaker, The House of Assembly
The Hon. K.H. Randolph Horton, JP, MP
Sessions House
21 Parliament Street
Hamilton HM 12

Dear Honourable Speaker,

I have the honour to present a Special Report – Diligent Development – to update the Legislature on subsequent information received further to:

- Today's Choices-Tomorrow's Costs, our Special Report regarding the Process and Scope of Analysis for Special Development Orders (February 2012); and
- Our Special Report pursuant to S. 16(3) of the Ombudsman Act 2004 (June 2012).

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

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

DILIGENT DEVELOPMENT – GETTING IT RIGHT

BERMUDA’S LEGAL OBLIGATIONS TO PERFORM IMPACT ASSESSMENTS

PREFACE

Last year, when I tabled *Today’s Choices – Tomorrow’s Costs* (“TC-TC”) regarding the Special Development Order process, I made a finding that the Civil Service had erred at law by not recognizing that Bermuda’s signature on the 2001 *UK Environment Charter* is a legal commitment.

In a press release dated 2 May 2012, the then Minister challenged the legality of my investigation of the procedure leading up to and informing decisions to grant SDOs. He also called into question my conclusion that the Charter sets out legal obligations:

We have taken advice from both the Attorney General’s office and the FCO via Government House, and conclude that the UK Environment Charter **does not constitute law**. It is unenforceable. Rather, the UK itself considers the Charter to be “aspirational”.

In June, I responded with a brief *Special Report* (“S.16 Report”) that demonstrated that the Privy Council agreed with the distinction I made between a decision and the procedure leading up to it. Therefore, as Ombudsman I was within the law to investigate the SDO procedure.

My *S.16 Report* also clarified and provided additional evidence that the Charter is a legal agreement. This included:

- a decision of the International Court of Justice about what constitutes a legal agreement between two governments;
- the rationale for the Charter set out in the 1999 White Paper;
- contemporaneous statements of both the UK and Bermudian Governments regarding their intentions that the Charter commitments are to be implemented; and
- subsequent evidence to the Environmental Audit Committee of the UK House of Commons by the Foreign and Commonwealth Office affirming the commitments of the Charter.

Since then, I have received additional information, including the only judicial decision to date about the legal effect of the Charter. Accordingly, it is important and appropriate that the Legislature and public be informed about this. This report pulls together in one document the evidence already presented in *TC-TC* and the *S.16 Report*, along with an overview of the legal landscape.

INTRODUCTION: ENSURING A LEGALLY SOUND DEVELOPMENT PROCESS

Bermuda's approach to development of its scarce land resources is at a turning point. For the sake of our children and grandchildren, it is time that Bermuda puts its words into action. The correct legal approach is clear and *now* is the time to act. With every decision made with blindfolds on, we fall further behind and do a disservice to our island and our future generations. We can do what is right today, or we can wait years for our courts, after costly litigation, to force us to do the right thing. The choice is ours. The choice is now.

1. WHAT IS THE ISSUE IN BRIEF?

Is Bermuda legally obliged to conduct Environmental Impact Assessments ("EIA") – with a robust public consultation component – prior to approving developments that are major or likely to have significant adverse environmental effects?

2. WHAT IS THE BRIEF ANSWER?

Yes. By signing the *UK Environment Charter* in 2001 Bermuda legally bound itself to conduct EIAs before approving major projects. Bermuda's obligations are further confirmed and reinforced by:

1. other commitments made in the *UK Environment Charter* and *Rio Declaration*;
2. responsibilities imposed by the *Convention on Biological Diversity*;
3. the common law doctrine of legitimate expectation;
4. recent caselaw; and
5. international best practices.

From a practical perspective, Bermuda is obliged to conduct an EIA prior to approval in principle for development proposals that are either "major" or "likely to have significant adverse effect on the environment".

3. OMBUDSMAN'S INDEPENDENT ANALYSIS

A. BRIEF BACKGROUND

PROTECTED LAND AT TUCKER'S POINT: THE LAST CORNER

In 1983, the nature reserve lands of Tucker's Point were set aside, along with 10% of land in Bermuda, for protection from development. This plan recognized the reserve's value as a home to complex ecosystems of caves, coral reefs, mangroves and forests. Now, Tucker's Point is the last remaining, most pristine, biologically diverse and environmentally sensitive corner of Bermuda's mainland.

APPROVAL OF SPECIAL DEVELOPMENT ORDER FOR TUCKER'S POINT

In 2011, the Government of Bermuda approved a Special Development Order ("SDO") to lift this protection for the development of a major resort. The SDO is an extraordinary process: it allows the approval of the development in principle without requiring any public consultation or independent assessments.

OMBUDSMAN INVESTIGATION: SHINING A BRIGHT LIGHT ON A DARK PROBLEM

I undertook, on the public's behalf, a comprehensive investigation of the scope and quality of information analyzed and recommendations made by civil servants for the Tucker's Point SDO.

My independent investigation confirmed that the current SDO process is inadequate: an EIA, coupled with a proper process for public consultation, was required to lift the conservation protection and to approve the SDO. One purpose of an EIA is to identify risks, ways to mitigate risks, and alternatives to development proposals (such as site or design). Another purpose of an EIA is to ensure transparent public consultation, disclosure and input. The government is bound to follow the nearly universal EIA process as a result of the following:

- commitments made when it signed the *UK Environment Charter*;
- common law doctrine of legitimate expectation; and
- international best practices.

B. OUR LEGAL OBLIGATIONS

UK ENVIRONMENT CHARTER

The 1999 White Paper – Partnership for Progress and Prosperity – set out the rationale for the UK's negotiation of Environment Charters with each of the Overseas Territories:

The partnership creates responsibilities on both sides. Britain is pledged to defend the Overseas Territories, to encourage their sustainable development and to look after their interests internationally. In return, Britain has the right to expect the highest standards of probity, law and order, good government and observance of Britain's international commitments...We intend bringing together the responsibilities, common objectives and cooperative approaches of the UK Government, Overseas Territory governments, the private sector, NGOs and local communities by drafting and agreeing an Environment Charter with the Overseas Territories. The Charter will clarify the roles and responsibilities of these stakeholders.

The Charter, which is a legally binding instrument signed by the UK and Bermuda, sets out the following commitments relevant to EIAs:

The Government of Bermuda will:

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.

11. Abide by the principles set out in the *Rio Declaration on Environment and Development*... [The *Rio Declaration* requires that EIAs shall be undertaken for proposals "likely to have significant adverse impact on the environment."]

The mandatory language and structure of the Charter is clear: it creates legally binding commitments.¹ According to one of the drafters, the words were chosen carefully to designate the future obligations we were undertaking at the time. The Charter commitments are explicit and detailed. We, like other countries subject to identical Charters, must stick to our word. Having signed the Charter, Bermuda has an undisputed obligation to conduct EIAs prior to approving major developments or those likely to have significant adverse environmental effects. Implementation of the commitment to ensure EIAs does not require domestic legislation or government expenditure.

UK'S INTERNATIONAL OBLIGATIONS

In 1992, the UK signed the Convention on Biological Diversity ("CBD"), an international legally binding treaty, which sets out responsibilities to conserve biological diversity and to ensure sustainable use of species and habitats. In ratifying the CBD, the UK assumed legal (as well as a moral) responsibility for its Overseas Territories ("OT") with respect to biological diversity. For Bermuda, the responsibilities under the CBD remain with the UK.

The primary method by which the UK fulfills its own responsibilities under the CBD with respect to Overseas Territories is by way of the Environmental Charters.

In 2007, the Foreign and Commonwealth Office ("FCO") reaffirmed the commitments of the Charter in evidence before the Environmental Audit Committee of the UK House of Commons. The FCO asserted that the Charter is the basis to work with Overseas Territories' governments on implementation. The responsibility for doing so is a cross-UK government responsibility of the FCO, Department for Environment, Food & Rural Affairs (DEFRA) and Department for International Development.

As recently as January 2012, in a policy document, "The Environment in the United Kingdom's Overseas Territories: UK Government and Civil Society Support", DEFRA defined the Charter as a "formal individual agreement, listing commitments to develop and implement sound environmental management practices in the OTs".

DOCTRINE OF LEGITIMATE EXPECTATIONS

Based on the common law doctrine of legitimate expectations, the Government of Bermuda can be legally held by the courts to perform actions that it promised to do.²

Legitimate expectations arise when the government makes it known that it will follow a specific course of action, including conduct set out in treaties.³ Government can depart from the expected course of action only where it has given proper notice and has given those affected an opportunity to be heard.

¹ The International Court of Justice in *Qatar v. Bahrain*, Judgment of 1 July 1994 (I.C.J.) ruled on the elements of legally binding agreements between governments. It is settled law that the hallmarks of legality in international law are intentions and specificity: specific commitments are set out with an intention to be implemented. Under this legal framework the *UK Environment Charter*, which is framed as an agreement between two independent governments, is a legally binding agreement.

² In *R (Bhatt Murphy) v. Independent Assessor* [2008] EWCA Civ 755 at para. 50, the UK Court of Appeal stated that where a public authority has promised to consult those affected or potentially affected, then it ordinarily must keep its promise and consult. It also warned that "[t]o do otherwise... would be to act so unfairly as to perpetrate an abuse of power."

³ As the Judicial Committee of the Privy Council said in *Higgs and David Mitchell v. The Minister of National Security and Others (Bahamas)* [1999] UKPC 55 at para. 12: "the existence of a treaty may give rise to a legitimate expectation on the part of citizens that the government, in its acts affecting them, will observe the terms of the treaty... In this respect there is nothing special about a treaty."

Once a legitimate expectation has been established, which is the case here, the onus shifts to the government to identify an overriding public interest to justify going back on its commitment.⁴ The onus therefore is on government, to follow what is literally, and legally, a legitimate expectation.

COMMON LAW – LEADING CASES ON EIAs

EIAs must be comprehensive, involve full disclosure, be done at the earliest possible time (but can be required at a later stage), involve proper public consultation, and provide adequate time. The source of the obligation to require an EIA can be legitimate expectations resulting from statements of government officials in recognition of the need to account for residents' concerns and wishes.

The UK Supreme Court (previously the House of Lords and Judicial Committee of the Privy Council) has established when EIAs are required and the nature and scope of those assessments:

Case	EIA Law Binding on Bermuda
<i>Berkeley v. Secretary of State For The Environment and Others</i> [2000] UKHL 36 (unanimous)	EIA must be comprehensive, accessible, non-technical, and involve public consultation
<i>Regina v. London Borough of Bromley (Respondents) ex parte Barker</i> [2006] UKHL 52 (unanimous)	EIA must be carried out at earliest possible stage and may be required at later stage if environmental impact was not known at "in principle" approval stage.
<i>Belize Alliance of Conservation Non-Governmental Organisations v. Department of the Environment</i> [2004] UKPC 6	EIA requires disclosure of relevant information and public discussion of issues
<i>Save Guana Cay Reef Association v. R.</i> [2009] UKPC 44	Public consultation should be at formative stage with adequate time and sufficient reasons for proposals.

COMMON LAW – RESULT OF FAILURE TO OBTAIN EIA

A recent case from the Eastern Caribbean Supreme Court is directly on point with the issues facing Bermuda: *Webster et al v. Attorney General (Anguilla) and Dolphin Discovery*. In that case, the Court reviewed the adequacy of EIAs based on commitments under the *UK Environment Charter* for the construction of a Dolphinarium and shopping complex. The Court found that the Charter (singly or taken together with the government's environmental strategy and action plan) established a policy and therefore created a legitimate expectation that the public would be consulted.⁵

⁴ The Privy Council in *Paponette v. Attorney General of Trinidad and Tobago* [2010] UKPC 32 at para. 37 stated that the matter then rests with the court to weigh the requirements of fairness against that interest.

⁵ "Public consultation, particularly in relation to developments and projects that will impact the environment, is now practically routine in all jurisdictions. Sometimes the duty to consult is made a statutory requirement, but even where it is not, it has become a policy in most quarters to observe this feature of procedural fairness": *Webster et al v. Attorney General (Anguilla) and Dolphin Discovery* (Civ) A.D. 2010 (ECSC) at para. 45. Also paras. 46-48.

C. IMPORTANCE OF IMPACT ASSESSMENTS

To some degree, Bermuda has acknowledged (but as discretionary only) its obligations arising from the *UK Environmental Charter*. Our Department of Planning issued Guidance Note 106 which explains the importance of EIAs and when they are required. GN 106 recites the *Rio Declaration* requirement for EIAs and sets out a comprehensive list of the purposes of EIAs. These purposes include:

- to incorporate environmental information in development decision-making;
- to examine alternative and superior options;
- to identify positive and negative environmental impacts;
- to recommend mitigation measures; and
- to allow for full and early consultation with stakeholders.

The current SDO process fails to meet these purposes. In addition, it does not recognize our current legal obligations or modern planning standards, nor does it provide for adequate public consultation.

The 2011 amendment to our *Development and Planning Act 1974* requiring SDOs to be approved by the Legislature, instead of a Minister, is a step in the right direction. However, the amendment impacts only who makes the decision and not the process leading up to it. While there are more people making the decision, the process still suffers from inadequate information gathering and analysis.

For guidance, we can turn to our current development plan process which entails robust consultation based on agreed standards and policies. The SDO bypasses this process and stands in stark contrast to this measured approach.

With no EIA, decisions are being made in the dark – Ministers and the Legislature do not have reliable and independent information and the public is not given the opportunity to be heard. Not only is there a lack of full environmental understanding, but there is also a lack of financial understanding and the true effect that the development proposals will have on our island. A combination of SDO conditions based on an ill-informed process and a hazy mishmash of studies are nowhere near the equivalent of a proper EIA. To suggest otherwise only does a disservice to the people of Bermuda but also raises red flags as to the reasons why a universally accepted process is not being used in Bermuda for the development of our scarce land resources.

By having an EIA process, our government would be in the position to mute suspicions that information is deliberately being withheld and that the grant of SDOs benefits the interests of a few rather than Bermuda as a whole. It would also ultimately secure inter-generational justice through the principles and practices of sustainable development.

To continue forward *without* the legally necessary due process of a proper EIA, *without* considering the impact, is like walking ahead blind without guidance – the legal equivalent of walking into barbed wire in the dark. Except here, the damage, once built: cannot be undone – we just cannot put the lava back in without being burned.

4. THE WAY FORWARD

In the Throne Speech of 8 February 2013, the Government stated:

The Government will build upon an earlier legislative amendment that ensured that Special Development Orders would be subject to Parliamentary scrutiny by implementing a protocol that is clearly articulated, transparent and fair. This protocol will guide the request for, consideration of and grant of SDOs.

No environmental expert⁶ consulted has been able to suggest what possible protocol Bermuda could create that would be better than an EIA. Most countries of the world, with the exception of a few countries such as Syria and Iran, require EIA for major developments. Does Bermuda really want to be in the company of these countries? Do we want to strike out on our own, defy the judgments of the highest courts, and ignore global best practices?

It is time for Bermuda to be realistic, join the 21st Century, and keep our promises. EIAs must be done prior to approval of major developments and all development proposals that may cause significant adverse impact on our fragile environment. The absence of EIAs is like producing a cookbook devoid of recipes.

In *Save Guana Cay*, the Privy Council adopted the statement of the President of the Court of Appeal: “The ecology of the Bahamas is said to be ‘fragile’ and possible deaths of those [coral] reefs due to ‘global warming’ coupled with environmental degradation may result from indiscriminate development of the islands, it is quite understandable that thinking persons would be concerned to protect, as far as humanly possible, their environment, not only for themselves, but also for their descendants who may have to inhabit these islands in the future.” All persons in Bermuda who have a stake in the well-being of the island that we leave for our children and grandchildren must be similarly concerned.

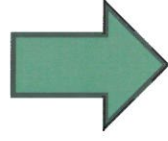
In conclusion, as Ombudsman, I am obliged to follow my own governing statute, the *Ombudsman Act 2004*. Section 2(1) of that *Act* obliges me to point out government “maladministration”, which is defined to include “inefficient, bad or improper administration and...includes...administrative action that was...contrary to law...based wholly or partly on a mistake of law or fact or irrelevant grounds...related to the application of arbitrary or unreasonable procedures.” I would be derelict in my duty if I did not point out that our word must be our bond – not just because it is the law but also because it is the right thing to do – for now and for tomorrow.⁷

⁶ Experts consulted include specialists in small island environments; a consultant to China’s State Environmental Protection Agency; and, the global environment advisor to the late Wangari Maathai – the only individual in the world awarded the Nobel Peace Prize for her work in the environment.

⁷ In *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 A.C. 629, the Court found that there was an expectation that a hearing must be held. Representations give rise to legitimate expectations not solely because people rely on them, but because it is an important principle that public officials should not break their promises.

DILIGENT DEVELOPMENT – GETTING IT RIGHT

Issue: Is Bermuda legally obliged to conduct EIAs?



YES

UK Environmental Charter

- Bermuda commits to EIAs
- Abides by Rio Declaration
- EIAs required before approval
- International best practices

Legitimate Expectations

- R (Bhatt Murphy) v. Independent Assessor
- Higgs and David Mitchell v. The Minister of National Security and Others (Bahamas)
- Paponette v. AG of Trinidad and Tobago

Recent Caselaw

- Webster et al v. Attorney General (Anguilla)
- Berkeley v. Secretary of State Environment
- Regina v. London Borough of Bromley
- Belize Alliance v. Dept. of the Environment
- Save Guana Cay Reef Association v. R.

***It's time to meet our obligations.
The choice is ours. The choice is now.***

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