

PLANNING AND DEVELOPMENT BILL 2018 – A BRIEF

1. INTRODUCTION

The current Town and Country Planning legislation was enacted in 1965 and is now over 50 years old. It no longer serves the needs of Barbados and was identified by the Government as needing urgent reform. Our current system is neither efficient nor transparent and is seen as an impediment to the investment urgently needed to transform the island's economy and bring about sustainable economic recovery. At the same time, it lacks the policies and tools to protect our fragile environment and cultural heritage which are vital ingredients of the county's assets.

In its 2018 Manifesto "Building the Best Barbados Together", the Government committed itself to improving the quality and speed of service delivery in order to promote the ease of doing business and identified Town Planning Permissions as a cause for concern. The reform of this outdated legislation was, therefore, identified as "mission critical".

To this end, the Government undertook an extensive stakeholder engagement programme to ensure that the people of Barbados could participate in the process, identify issues and solutions and have an input into the formulation of the new legislation. Two stakeholder events were held on 16th and 26th July 2018 and social media was used to encourage further participation. Following on from this consultation a Green Paper was prepared and made available for comment. The Green Paper was approved by Cabinet and debated in Parliament from 19 October 2018. Responses to the Green Paper from individuals and organisations varied from comprehensive comments on the principle of the proposed changes to detailed technical submissions and expressions of individual concerns. The comments received on the Green Paper, together with contributions made at the stakeholder events, have informed and framed the approach taken to the drafting of the Planning and Development Bill 2018.

The new Planning and Development Bill is among the most far-reaching reforms of Government yet. The entire orientation of the planning process changes. Decisions to deny or require conditions to a planning application must be given in short and specific time frames, must be explained, can be challenged and must pass the test of equal and fair treatment to all. Planning decisions must follow from a plan that promotes sustainable development, protects our natural environment, is subject to consultation and once agreed, is available to all on-line.

The most fundamental change is the role of the Town and Country Planning Development Office as not simply a regulator but a facilitator of sustainable development. The draft Act introduces the concept of provisional refusal, where clear explanations will be given on the changes to a refused application that would allow it to be approved. The new Act promotes long-term planning done transparently, predictably, inclusively and in a timely manner.

This brief, based on the White Paper, sets out the proposals included in the Planning and Development Bill 2018.

From the outset, the review of the system was guided by a number of key goals and principles which underpin the new legislation.

- a) GOAL 1. Transparency and accountability
All decisions in the town planning system should be made in a way that it is clear about who or what body has made the decision and why the decision has been made.
- b) GOAL 2. Openness and inclusiveness
Members of the public should be able to input into the decision making process. Where possible decisions should be made in public and individuals should have a right to have their views heard. Public registers should be accessible in hard copy and on line.
- c) GOAL 3. Efficiency and effectiveness
Decisions should be made in a timely manner, and timescales should be adhered to by all parties.
- d) GOAL 4. Sustainable development
Decisions should be guided by the principles of sustainable development ensuring long term environmental, economic and community health and wellbeing.
- e) GOALS5. Fit for purpose
All legislation, regulations, policies and procedures should be fit for purpose. They should reflect the specific needs of Barbados as a small island state in the 21st century.

PRINCIPLES

- a) PRINCIPLE 1 Good Governance
Good governance is critical to ensure trust and confidence in the system. In a small and interconnected society like Barbados it is important to guard against the influence exercised by proximity and the potential for corruption. Governance arrangements should be put in place that reduce the potential for undue influence or corruption and require high standards of integrity including declarations of interest.
- b) PRINCIPLE 2 E-Government (digital by default)
In the 21st Century the maximum use should be made of e-government. The Town Planning system should be computerised in a way that allows easy access by the public to information, more efficient consultations and reduces bureaucratic delays. Improved platforms for data sharing and providing management information should be used to improve plan making, provide evidence-based policy decisions, improved management information, as well as improvements to the user experience.
- c) PRINCIPLE 3 Consultation and participation.

Both the plan making process and the control of development should encourage public participation. An ability to influence decisions will help improve the public understanding of the planning system and make it a more valued and trusted part of government activity.

d) **PRINCIPLE 4 Proactive Management**

A new culture of proactive management which encourages interaction with the public and is focused on enabling and facilitating high quality sustainable development not just controlling and regulating development, will require a culture change. It will also need to proactively monitor and manage performance to achieve the necessary improvements.

This White Paper summarises the proposed reform of the existing planning legislation. It has developed from extensive consultation and seeks to address a range of issues which have in recent times undermined the reputation of the current system.

The Draft Planning and Development Bill contains a wide range of measures which are outlined below.

2. PART I - PURPOSE

Part 1 sets out the purpose of the Bill and can in broad terms be summarised as follows:

- a) Facilitating the development of land in a way that takes account of the social economic and environmental needs of the Barbados now and in the future.
- b) Delivering high standards of development in Barbados that promote health and well-being, protects our natural and cultural heritage while at the same time preserves the essential aesthetics of our vernacular architecture and local character.
- c) Providing efficient and accountable public services in the delivery of planning services in order to protect the public good.
- d) Enabling and encouraging high levels of public participation by providing appropriate access to public information and opportunities to participate in decision-making processes.
- e) Providing effective means of access to redress and remedies for people aggrieved by actions taken under the provisions of this Act.

3. PART II - ADMINISTRATION

Part II of the Act introduces one of the most significant changes in approach to decision making in town planning in Barbados. It introduces for the first time a new governance structure with the establishment of the Planning and Development Board.

This Board is a body corporate with perpetual succession and a common seal and is responsible for implementing policies framed by the Minister. It is a statutory board, however, not a statutory corporation and therefore avoids the high costs normally associated with the latter arrangement.

The Board will consist of the Chief Town Planner and twelve (12) persons and will be chaired by a Chairperson appointed by the Minister but who is not a government employee. The Chief Town Planner will serve as the Executive Secretary to the Board. The Board will comprise four (4) ex-officio members from relevant Government Departments. In addition, the Minister will appoint one (1) member on recommendation of the National Trust, two (2) members after consultation with the professional bodies representing professional land use planners, architects, engineers and land surveyors and four (4) members drawn from the legal profession, financial institutions, private sector business, academia or non-governmental organisations. All members of the Board must have knowledge and experience of matters relevant to land development. All members (apart from the ex-officio members) may serve a term not exceeding 3 years, but may be eligible for reappointment providing that they do not hold office for longer than 6 consecutive years.

Rules setting out the conduct of the Board are prescribed including specific rules on voting arrangements and conflicts of interest. The Board will meet as frequently as necessary to transact its business and at least once a month. It may appoint standing or ad hoc committees or working groups if necessary.

The Minutes of the Board will be public documents and will be made available for inspection at the Planning and Development Department and in electronic form.

In the consultation on the Green Paper, there was general support for the principle of establishing the Board, but some concerns were expressed about potential inefficiency caused by the volume of workload unless more routine matters were delegated to the Chief Town Planner. The First Schedule to the Bill identifies complex developments which will be decided by the Board. Provision is made for other applications to be delegated to the Chief Town Planner.

4. PART III - PHYSICAL DEVELOPMENT PLANS

Barbados already has a well established process of preparing Physical Development Plans including high levels of public participation in the process. However, concern was expressed that the status of the plan was not clear enough and there was limited scope to develop area-based plans or detailed policy documents to support its implementation.

The proposed legislation makes it clear that the Board should give principal consideration to and be guided by the Physical Development Plan in considering planning applications. It also provides powers for preparing and approving Physical Development Plans for parts of the island and for developing supplementary Planning Policy Documents to guide development.

The existing requirement for reviewing the Physical Development Plan has been extended from 5 to 10 years, to better reflect the long-term nature of the plan and practicalities of conducting this major review process.

5. PART IV – REGULATION OF LAND DEVELOPMENT

The definition of development in the current Act is well established and has been maintained. However, building or engineering operations for or involving the demolition or alteration of a listed building or a property within a heritage conservation area are now deemed to constitute development. This reflected concerns expressed at the stakeholder events and in the consultation responses on the Green Paper that heritage and conservation aspects of the legislation needed to be strengthened.

The main features of this part of the legislation are the general presumption in favour of development, encouragement of discussions prior to making an application and the imposition of tight timelines for making the decisions whether the decision is made by the Chief Town Planner, the Board or the Minister. Provisions are also made for the publicity of applications and for the Chief Town Planner, Board or the Minister to take into account objections, representations and comments made.

Tight time lines are imposed on referral agencies and limitation periods are set for determining an application once a complete application is made. These are 12 weeks for applications where an Environmental Impact Assessment is required, 10 weeks for complex cases (described in the First Schedule) and 6 weeks for all other cases. This time limit can be extended by agreement between the applicant and the Chief Town Planner. If these time limits are not met, the applicant can appeal to the Appeals Tribunal. If referral agencies fail to respond within the time allocated, the Minister, the Board or the Chief Town Planner will make a decision without their input.

In processing an application, the Chief Town Planner can request further information within prescribed time limits and the time for processing an application does not start until the required information is provided.

The new legislation also provides for a number of new or significantly changed types of application / decisions. These include:

- Applications to determine whether permission is required
- Approvals in Principle
- Provisional Refusals
- Certificates of Lawful Use or Development.

The two major changes relate to Approvals in Principle and Provisional Refusals.

The new Approval in Principle replaces the old outline permission. However, this is not a planning permission and does not confer the right to start construction or to compensation. The purpose of an approval in principle is to allow the developers the opportunity to test the acceptability of a development concept before making a major investment in detailed design work and studies. It is made at a conceptual stage and may require an initial environmental evaluation rather than a full Environmental Impact Assessment. Such approvals in principle can be granted with or without conditions or reserved matters or refused if the Board considers that they are unable to determine the application for approval in principle without the submission of more detailed information.

Provisional refusal is a new form of decision that can be issued by the Board where the Chief Town Planner indicates what modifications to the development proposal are required before permission might be granted. This process will be time limited.

The Bill also sets out requirements for submitting a planning application, the duration of a planning permission and the commencement and completion of development.

There has been some concern that the Environmental Impact Assessment requirement has no legal basis in Barbados law and criteria governing its use are not explicit and consistent. Part IV and the Third Schedule provide a legal basis for requiring Environmental Impact Assessments and also set out projects for which Environmental Impact Assessments will be required.

New extended provisions are made for the Board to enter into agreements for planning obligations with the applicant. The existing legislation limits planning obligations to requirements for the provision of affordable housing. The new legislation widens the scope for the use of planning obligations and sets down rules for their implementation, modification and discharge. For example, planning obligations might be used for highway improvements linked to traffic generation from a new development, enhanced beach access and facilities linked to a beachfront development or additional class rooms or school facilities related to new residential development. A planning obligation is an agreement entered into by way of an instrument executed as a deed and shall be registered as a charge on the land.

Under the new legislation the Minister may still give directions requiring that applications or classes of application be referred to the Minister for determination. Such decisions will ordinarily involve either significant departures from the approved Physical Development Plan or be of strategic economic or environmental significance. These applications will be dealt with by the Chief Town Planner and submitted to the Minister for determination. If the applicant or an objector or the Chief Town Planner desires it, they may present their case in writing or appear before and be heard by a member of the Appeals Tribunal who will report to the Minister. Strict time limits are imposed for this process including the decision by the Minister. Ministerial decisions are final.

An applicant (or anyone having an interest in the land) who is aggrieved by the decision of the Board or the Chief Town Planner may appeal to the Tribunal within 28 days. The composition of the Appeals Tribunal and the procedures governing its role are set out in Part XI.

Detailed regulations and in particular new Development Orders will be prepared following the enactment of this Bill and will cover areas such as the definition of permitted development and the preparation of a new "Use Classes Order". The Development Order will amongst other things specify those types of development which fall within the definition of development, but which are considered to be permitted development by virtue of this Order.

6. PART V – BUILDING ENGINEERING AND SUBDIVISION PLANS

The Bill makes it clear that certain types of building plans included in applications for planning permission must be stamped and signed by a registered engineer or architect and identifies other development which does not need certification by one of these registered professionals. It also clarifies that the Crown is exempt from liability for negligence for building operations arising from the granting of planning permissions.

It is also pointed out that planning permission does not provide authority to carrying out building works until any other regulatory approval that is required is obtained.

Provision is made in this section for emergency engineering operations urgently needed for coastal conservation or sea defences or in the interest of public safety or preservation of property providing it is certified by the Director of the Coastal Zone Management Unit.

Although sub-division has always been a form of development in Barbados there have never been regulations governing what is required. The new Bill sets out these requirements including requirements for the provision of roads and infrastructure and the dedication of land for open space. It also addresses the future maintenance of such land and arrangements for certifying completion of development and transfer of parcels of land.

A new category of severance is applied to small subdivisions which abut an existing all-weather road with adequate servicing or subdivisions to make adjustments to boundaries or create rights of way.

7. PART VI – PROTECTION OF CULTURAL AND NATURAL HERITAGE.

Barbados has a wealth of heritage assets which provide a very valuable contribution to the character of the island and its attraction as a tourist destination. However, much of the built heritage is in poor condition and at risk of loss. The existing legislation is weak and very limited and penalties for non-compliance are so low as to provide no deterrent. Part VI seeks to strengthen the provisions and bring the demolition or alteration of a listed building within the remit of planning control as recommended by heritage interest groups.

Part VI also formalises the process of listing buildings, including publishing and adopting the list of cultural heritage buildings, monuments and sites. It makes it clear that no one can demolish or make material alterations to listed properties or a site without first obtaining planning permission. Exceptions are made in the case of the execution of emergency work required in the interest of public safety or the preservation of a listed building or neighbouring property provided it is certified by a registered architect or engineer.

There are also provisions for emergency listing to provide interim protection to an unlisted building were the Minister deems it necessary until it can be formally included in the list.

Powers are also provided for the formal designation of a Heritage Conservation Area. In these areas demolition or alterations to buildings will also require planning permission.

Similar provisions are made for the protection of areas of natural beauty or interest including submarine and subterranean areas and for the making of Tree Preservation Orders for the preservation of trees, groups of trees and woodlands.

The Board is also required to ensure that adequate provisions are made for the preservation or planting of trees by the imposition of conditions when planning permission is granted.

General provisions are also made for the service of a notice on owners of buildings, vacant sites and open land whose properties are despoiling the amenity of any part of Barbados and to enter into the land and carry out the work in default and recover the costs.

There are a range of offences for owners or occupiers who contravene the restrictions imposed on listed buildings, Heritage Conservation Areas, Natural Heritage Conservation Areas and Tree Preservation Orders. Current penalties do not reflect the severity of the offence or act as a deterrent. When setting penalties and fines under the new legislation care will be needed taken to ensure that the fines are appropriate to the offence not only now but in the future.

Any person aggrieved by the provisions of this Part of the Bill has a right of appeal to the Tribunal in accordance with Part XI of this Bill.

8. PART VII – CONTROL OF OUTDOOR ADVERTISEMENTS.

The section on Advertisement control is largely based on the provisions of the existing legislation, but has been brought up to date. Under this section there are also powers to make special provision in areas defined as areas which require special protection on the grounds of amenity.

9. PART VIII – ENFORCEMENT

Enforcement is a critical tool in delivering an effective planning service. Under the existing legislation there is a suite of measures that can be taken by the Chief Town Planner to enforce compliance with planning control. However, action must be initiated within 4 years of the unauthorized development having been carried out. The majority of stakeholders and respondents to the formal consultation considered that the 4-year period was appropriate

The new legislation retains the 4-year period for initiating action and transfers the responsibility for Enforcement to the Board. Where development is carried out without planning permission or in breach of the conditions subject to which such permission was granted, the Board may serve the owner and occupier of the land with an Enforcement Notice setting out the breach of planning control committed and the steps the developer must take to remedy the breach. Where the development consists of or includes the carrying out of building or other operations, the Board may also serve a Stop Notice requiring works for the development cited in the Enforcement Notice to cease immediately. If the developer fails to comply with the Enforcement Notice within the specified time, the Chief Town Planner may enter upon the land and take the steps required by the Notice and recover the cost of doing so from the owner of the land. The person served may also be prosecuted and fined for non-

compliance with an Enforcement Notice or a Stop Notice. Enforcement notices are subject to the strict interpretation standards applicable in the criminal law because they may lead to such trials.

Under the existing legislation a person served with an Enforcement Notice has the right to appeal to a Judge in Chambers against the notice, but Stop Notices can only be challenged by Judicial Review in the High Court. This anomaly is rectified with both notices now being appealed to the speedier route of Judge in Chambers.

In line with a request from the Chief Town Planner provisions have been made for these notices to be prepared and served by staff in town planning with adequate training in legal requirements and procedures.

Current levels of penalties are so small as to not constitute a deterrent. The current Bill will allow for more appropriate penalties to be applied.

10. PART IX – ACQUISITION OF LAND FOR PLANNING PURPOSES

The current legislation has a very specific powers of identifying land for Compulsory Purchase as part of the Physical Development Plan. This power is seldom used and could lead to planning blight which brings with it liability to compensation.

These provisions have been replaced by a more general power to acquire land to facilitate development, redevelopment or improvement of land or in the interest of the proper planning of an area. Such powers may not be exercised unless it can be demonstrated that the purchase of the land will promote or improve economic, social or environmental well-being.

These powers can be very effectively used to assist in land assembly and delivery of important projects.

Controls are put in place to ensure that the disposal of land acquired compulsorily is done in an open and transparent way.

11. PART X - COMPENSATION

The extent of compensation payable in respect of town planning matters is very limited and these powers are seldom used. However, care has been taken in redrafting the legislation to limit the Crown's liability for compensation.

12. PART XI – PLANNING APPEALS

The Bill provides for a new Tribunal to hear Planning Appeals. The principle of this approach received significant levels of support from consultees including planning officials. It replaces the existing system where the Minister appoints an individual lay panel member to hear appeals and make recommendations for Ministerial decision. The present system sets out no timelines for decision making and has resulted in large backlogs and long delays. The

panellists also have no requirements for knowledge or experience of the planning or development system.

What is proposed is a tribunal of three members appointed from a broader panel of 6 – 9 people on a rotation basis. The panel will be appointed by the Governor General on the advice of the Prime Minister but will be required to have a minimum of 5 years of practical experience in fields of law, physical development planning, environmental management, coastal zone management, architecture, surveying or land development. No one having a conflict of interest in a case may be appointed to hear the case.

The work of the Tribunal will be managed by the Clerk of the Tribunal appointed by the Permanent Secretary.

The function of the Appeals Tribunal is to adjudicate on decisions made by the Board and the Chief Town Planner in performing their functions in respect of this Bill. Certain persons aggrieved by decisions made in respect to the Bill have a right to appeal to the tribunal. These include an Applicant for Planning Permission who has received a refusal or conditional approval and is not happy with the decision. Appeals can also be lodged under the provisions of part VI in respect of conservation of the cultural and natural heritage.

Any person wishing to appeal must serve a notice of appeal on the Clerk within 28 days giving the grounds on which they wish to appeal and stating if they wish to have the case dealt with by written representations or a hearing.

Whether the appeal is heard by written representations or in a hearing, the principles of natural justice apply. Where hearing evidence from one party, the other party has the opportunity to consider that evidence and make representations on it.

Clear timelines for the exchange of evidence and the holding of an inquiry will be applied and the decision of the Appeals panel will be delivered within 14 days of the conclusion of the hearing and the Appellant shall be notified of the decision with a statement of reasons and the decision shall be published and made available to members of the public at the Department and in electronic form on the internet.

The decision of the Appeals Tribunal is final and can only be challenged on points of law to a Judge in Chambers.

13. PART XII – MISCELLANEOUS

This section provides powers to enter property and require information and serve notices, in the exercise of this legislation. It also requires the Chief Town Planner to compile and maintain registers on and including a range of applications, notices and obligations, conditions and charges and decisions made whether by the Minister, the Board or the Tribunal. Registers must be updated within 5 working days of a decision and both the register and indexes must be available for inspection by the public and available in an electronic data storage and retrieval system.

Persons wilfully giving false information in order to obstruct the exercise of powers under this new Act are deemed to have committed an offence as are public officers, Board or Tribunal members who solicit or accept bribes and any person offering a bribe also commits an offence and is liable to the prescribed penalties.

Any Public Officer, Board or Tribunal Member who fails to declare a conflict of interest and recuse themselves from the decision-making process is also guilty of an offence.

This part of the Bill also repeals, saves and amends existing legislation and makes transitional arrangements for applications wholly or partially determined at the point that the new Act comes into force.

14. IMPLEMENTATION

Following the enactment of this legislation, there is a need to produce a number of pieces of subsidiary legislation in the form of Regulations in addition to the new Development Order and Use Classes Order.

However, for this legislation to achieve the desired improvements in delivering an efficient planning service that supports and facilitates the proper development of the country and its ability to attract investment in a very competitive environment will require a range of other actions.

Not only will there be a need for training and development of public servants and members of the new administrative structures but a re-education of the general public and the development industry.

Existing systems and ways of doing things will need to be reengineered and new technology introduced. Bottlenecks in the system whether in planning or other departments need to be identified and resolved.

A start has already been made to introduce new standard operating systems which will mean that from mid-January 2019, plans will be submitted and transferred to referral agencies electronically and staff and applicants will be able to monitor progress online. In addition, a new Statutory Register is being rolled out and will be available to the public electronically. Improved electronic processing of applications should help to improve efficiency

However, above all else there will be a need for a change in culture which sees planning as a facilitator and not merely a regulator and takes a proactive approach to managing performance and implementing change. Making these changes to a bureaucratic system requires clear and committed leadership from the senior people involved. Staff will require new skills to deliver this ambitious programme. Similarly, new governance structures need different skills to ensure that they are adequately serviced and the decision-making process is managed to deliver efficient results.